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A SELECTION OF CASES

ON

EQUITY JURISDICTION

BY

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CASES ON EQUITY JURISDICTION.

CHAPTER I.

ORIGIN, NATURE, AND LIMITATION OF EQUITY JURISDICTION.

FROM time immemorial it was one of the prerogatives of the king to administer justice to his subjects. He could do this personally, or delegate the power to others, at his option. As his prerogative did not extend to legislation, he was bound to administer justice according to law, and not according to his own ideas of right,—still less according to his own fancy or caprice. It seems to have been a part of his prerogative, however, to adopt such a system of procedure as he saw fit, at least in the absence of any legislation to the contrary. At an early period it became the established course for the king to delegate his judicial power in civil causes to judges appointed by him for the purpose. This delegation, however, was not general, but was made specifically in each case, *i. e.*, when the king was applied to for the redress of some grievance, he gave the complainant a writ, requiring the party complained of to appear before the king's judges, and authorizing the latter to take cognizance of the case. The writ briefly stated the nature of the complaint; and, if the case turned out to be different from what the writ stated, the judges would have no authority to proceed, and the plaintiff failed. Originally, it would seem, the judges were authorized to mould their procedure into such form as they saw fit; but this power was in a great measure lost in process of time, the fundamental principles of their procedure becoming so fixed by long use that they were binding upon the judges as a part of the law of the land.

Sometimes it would happen that a case would be presented to which no existing writ was adapted, and yet the case would be one which demanded a remedy of some kind. In that event, the king must

either take direct cognizance of the case, or he must have a new writ framed expressly for it. For reasons which it is not necessary here to inquire into,¹ the latter course became impracticable at an early day, and the former alone remained. So also cases arose in which it was useless to give the complainant a writ, since the king's judges, from the nature of their procedure, could either afford no remedy, or only an inadequate one. Of such cases, therefore, the king alone could take effective cognizance.²

It was in this way that the jurisdiction in equity arose. It consisted of that portion of the king's judicial prerogative in civil causes which he had retained in his own hands, having never delegated it to his judges by writ. It is true, the king did not take cognizance of equity cases personally, any more than he did of common-law cases, but in legal contemplation he did: and the chancellor differed from the common-law judges in this particular among others, namely, that he exercised the king's prerogative directly, his judicial acts deriving their efficacy from the fact that, in legal effect, they were the acts of the king, the chancellor being little more than the king's secretary. This is the explanation of several peculiarities of procedure in chancery. Thus, all writs which are issued in the prosecution or defence of a suit in chancery must be sealed with the king's great seal, and are tested in the king's name, no matter how slight or unimportant the occasion upon which they are to be used; and notwithstanding the serious expense, delays, and inconvenience which are caused by what seems upon its face to be a useless form.³ The common-law courts have seals of their own, and when they have once received authority from the king, by writ under the great seal, to take cognizance of an action, all further writs which are necessary in its prosecution or defence are issued under their own seal, and are tested by their chief justice. But the chancellor has never had a seal of his own, and he cannot even compel a witness to appear and testify, except by a writ under the great seal.⁴ The chancellor also has to

¹ See 1 Spence, 325.

² The jurisdiction exercised by courts of equity may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law.—Fonblanche, Equity, Bk. I., chap. 1, § 3, note f.—ED.

³ Thus, it is only on certain days in term time, and just before and just after each term (which are called seal days), that a writ can regularly be sealed with the great seal. To have it done at any other time, special application must be made and a heavy fee paid.

⁴ A person becomes chancellor simply by the king's personally delivering the great seal into his hands; and he resigns the office by redelivering the seal into the king's hands, which the king may require him to do at any moment. When-

enforce his authority by writ in cases where, upon ordinary principles, a writ is neither necessary nor proper. Thus, all the decisions of the chancellor, upon questions brought before him, are embodied in orders or decrees, which are formally drawn up in writing, and which, as will be seen presently, always direct the party against whom they are made to do or not to do something. The normal mode of enforcing such orders and decrees would be to serve them upon the parties respectively by whom they are to be performed (generally by showing the original and delivering a copy), and, if they refuse obedience, to punish them for contempt of the authority of the court. But in chancery the mode is, to issue a writ under the great seal, incorporating in it the tenor or the substance of the order or decree, and commanding the party to perform it;¹ and, if he refuses obedience to the writ, he is guilty of a contempt, not to the chancellor, but to the king; and hence, when the chancellor proceeds to punish him for his contempt, he adopts a mode of proceeding unknown to any mere court of justice, the delinquent being treated as a rebel and contemner of the king's sovereignty.² Finally common-law judges can exercise their authority only when holding a court, the delegation of authority being to the court, and not to the judges individually; and this has the effect of limiting the action of common-law courts to term time, they having no authority to sit in vacation. But as the chancellor represents the king, his authority is personal, and may be exercised at any place within the kingdom, and equally in term time or

ever the seal is in the king's hands, all bills in equity must be addressed to him directly, as they must also when the person holding the seal is a party to the bill.

¹ The writ used for this purpose is called a writ of execution of the decree or order. This explains the fact that all injunctions are by means of writs. The chancellor first makes an order or decree that a party be enjoined; and then a writ issues (popularly known as a writ of injunction) to enforce the order or decree.

² In Furlong v. Bray, 2 Wms. Saund. 182, which was an action of trespass for an assault, battery, and false imprisonment, the defendant pleaded that the court of chancery made an order, in a suit there pending against the now plaintiff, reciting that said plaintiff was in contempt for not obeying a decree of the court requiring him to pay to the plaintiff in that suit £100, and directing that said plaintiff stand committed to the prison of the Fleet; wherefore the defendant, as servant and assistant to the warden of the Fleet and by his command, took said plaintiff and delivered him to the said warden to be imprisoned, whereupon he was imprisoned for the space of ten days; quae est eadem, etc. This plea was demurred to, and the exception taken to the plea by Saunders was that said order was not a sufficient warrant or authority to take and imprison the plaintiff without a writ; for he said that, in pursuance of the order, a writ should have been awarded out of chancery for taking the prisoner, and that such was the course of chancery. Wherefore it was adjudged for the plaintiff.

vacation.¹ It is commonly said that the court of chancery is always open; but in truth the chancellor does not hold a court in the strict sense of the term, and hence his sessions are not formally opened and adjourned, like those of common-law courts.²

Bearing in mind that the king, as well as the common-law judges, was bound to administer justice according to law; that he differed from the latter in being free to adopt such a system of procedure as he thought fit; and that the necessity for resorting to the king's prerogative jurisdiction arose from the inability of the common-law courts to afford an adequate remedy for all existing rights,—it follows that equity originally differed from the common law in little else than in having a different system of procedure, and thus affording different remedies, and, in particular, it follows that the court of chancery did not administer a different system of law from the common-law courts, as the ecclesiastical and admiralty courts did. What, then, were the defects of the common-law procedure which gave rise to equity, and how were these defects remedied by the system of procedure adopted in chancery?

The common-law procedure is founded upon the theory that the parties to an action owe no obedience to the court.³ Accordingly, a common-law court never redresses a wrong done to a plaintiff by laying a command upon a defendant. Thus, if a defendant in an action detains property belonging to the plaintiff, the court gives judgment that the plaintiff recover it, and thereupon issues a writ of execution directed to the sheriff, and commanding him to put the plaintiff in possession of the property, if real; if personal, to take it and deliver it to the plaintiff. But in the latter case, if the sheriff cannot find the property, a court of common law can do nothing for the plaintiff ex-

¹ Crowley's Case, 2 Swanst. 1.

² It may be added that the chancellor's chief executive officer is the sergeant-at-arms, an officer whose appropriate duty it is to attend upon the person of the king.

³ This statement must not be taken too absolutely; for common-law courts, by their modern practice, do require obedience from suitors as to all questions which arise incidentally in the progress of an action, and which do not affect the merits of the controversy. Such questions are decided by orders, made upon motion; and, if the occasion requires anything to be done by either party to the action, the order commands him to do it, and it is enforced by process of contempt. So witnesses are compelled by the same process to appear and testify, though formerly the only remedy against them, in case of refusal, was an action by the party injured. *Hammond v. Stewart*, 1 Str. 510; *Chapman v. Pointon*, 2 Strange, 1150; *Bowles v. Johnson*, 1 Wm. Bl. 36. But how foreign to common-law procedure is the idea of requiring obedience appears from the fact that it has no means of its own of enforcing it, the process of contempt having been borrowed directly from the civil law.

cept give him damages. The defendant may know where the property is, having purposely removed it or concealed it from the sheriff; still he cannot be ordered to deliver it to the plaintiff. So, if a defendant has refused to perform a contract, a court of common law can only give the plaintiff damages, no matter how important to the latter actual performance may be. So a defendant may threaten to do the plaintiff an irreparable injury, or he may be actually doing it, and repeating it from day to day, yet a court of common law cannot prevent it. It can only give the plaintiff damages after the injury is committed. So the power of a common-law court to enforce a judgment for the recovery of money begins and ends with issuing a writ of execution to the sheriff, commanding him to seize the property of the judgment-debtor and apply it to the satisfaction of the judgment. If the judgment-debtor has no property that is capable of seizure, or none that the sheriff can find, the judgment must remain unsatisfied, for anything the court rendering it can do, though the judgment-debtor have millions in *chooses en action* or in shares in incorporated companies. So if A has received property to hold in trust for B, the latter can have no remedy at law; for A is confessedly the owner of the property, and a court of law cannot compel him to perform the trust. Nor can a court of law make a division or partition of property among several co-owners, though it formerly attempted to do so in case of real estate. To do this successfully in any but the simplest cases, it is necessary that the court should assume control over the parties. In one instance courts of law seem formerly to have departed from their principles, namely, in entertaining the action of account, *i. e.*, an action to compel the rendering of an account; but their methods were so ill adapted to such a purpose that this action long since became obsolete.

The power of common-law courts is subject to another important limitation, intimately connected with the foregoing, if it does not indeed result directly from it. They cannot deal with a controversy to which there are more than two parties or two sets of parties. The contract of suretyship will serve as an illustration of this. To such a contract, in its simplest form, there are three parties, viz., the creditor, the principal debtor, and the surety; and no two of them are united either in interest or obligation. No more than two of them, therefore, can be parties to any action at law. If there are several sureties, the case is much worse: for though they may all be sued at law by the creditor, if their obligation be joint, yet, in any controversy with the debtor in which they are all interested, the law can afford no remedy; for only one of them can be a party to an action by or against the debtor. In other words, a court of law can only

entertain a controversy between the debtor and one surety. So, if a controversy arises between the several sureties, a court of law is equally powerless, as it can only entertain a controversy between two of them.

It may be added that the jurisdiction of a court of law is contentious only, that is, it is strictly limited to deciding controversies.

These defects in the common-law procedure could be effectually remedied in only one way, namely, by adopting a procedure founded upon the principle of compelling litigants to do whatever the chancellor decided that by law they ought to do. Such a system was furnished by the ecclesiastical courts. It was not only their constant practice to adjudicate upon the duties of litigants, and to compel performance thereof specifically ; but, in consequence of their having no jurisdiction over property, it was their only mode of administering justice. It is true that they were equally without jurisdiction over the bodies of litigants, and had to confine themselves to punishments of a spiritual nature ; but, when they had exhausted those without effect, they were entitled to apply to the king for a writ of *capias*, upon which the delinquent was arrested and imprisoned until he submitted. In this mode, therefore, their whole judicial power was exercised. It mattered not whether a party was to be required to take some necessary step in a suit, or to pay a sum of money found to be due to his adversary, or to pay costs, or to perform some more specific duty to his adversary, or to refrain from committing some wrong against him : in either case he was first ordered by the court to do or refrain from doing the thing in question ; if he refused obedience he was pronounced contumacious, and excommunicated ; and lastly his excommunication was signified to the king, and thereupon a writ *de excommunicato capiendo* was issued, upon which he was arrested by the sheriff and imprisoned in the county jail.¹

This system was adopted literally by the chancellor, *mutatis mutandis*, in the exercise of the prerogative jurisdiction ; and it has continued in use without change to this day. Indeed, as a rule, the chancellor, like the ecclesiastical courts, had no jurisdiction *in rem*, and hence could only enforce his orders and decrees by process *in personam* ; though whether this was a cause or a consequence of his adopting the ecclesiastical procedure may be doubtful. To some extent, however, the chancellor has asserted and maintained the right to proceed *in rem*. Thus, when all process against the person has been exhausted without effect, he will issue a writ of sequestration

¹ See Oughton, tit. 43, 44. The ordinance by which the ecclesiastical courts were established provided that, if excommunication should not suffice, recourse might be had to the secular power.

against the property of the delinquent.¹ So when a defendant has been decreed to deliver possession of land to the plaintiff, as a last resort a writ of assistance will be issued to the sheriff to put the plaintiff in possession.² But, with these exceptions,³ chancery exercises all its powers by process of contempt against the person.

¹ 1 Spence, 391.

² 1 Spence, 392.

³ After all, these are scarcely exceptions to the rule that the chancellor has no jurisdiction *in rem*. When he issues and enforces a writ of sequestration, or a writ of assistance, he merely exerts physical power over the possession of property, and this he can do, though he have no jurisdiction whatever *in rem*. A court which possesses that jurisdiction can by its judgment or decree take the title to property out of one person and put it in another. Thus, courts of admiralty are in the constant habit of ordering the sale of property against which proceedings *in rem* are taken, and when property is thus sold, all existing titles to it are extinguished, and the entire ownership of it becomes vested in the purchaser. So when the property of a judgment-debtor is seized and sold to satisfy the judgment, the title of the judgment-debtor is as effectively transferred to the purchaser as if the sale had been made by the judgment-debtor himself. So when common-law courts were in the habit of entertaining suits for the partition of land, the partition was made by the court itself without any act of the owners of the property whatever. The court first rendered judgment that partition be made (*quod partitio fiat*); whereupon a writ was issued to the sheriff, directing him to make a partition of the land pursuant to the judgment, and report the same to the court. When this had been done, the court rendered another and final judgment that the partition so made remain firm and stable forever (*firma et stabilis in perpetuum teneatur*); and by force of this latter judgment each party acquired the exclusive title to the share allotted to himself, and ceased to have any title to the shares allotted to the others. This power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective, *i. e.*, when the sale had been made he compelled the owner to execute a deed pursuant to the sale; and hence, when the owner was out of the jurisdiction, or labored under any incapacity, *e. g.*, that of infancy, the chancellor was powerless. He could not even make the appointment of a new trustee effective, except by compelling the old trustee or his heir, or whoever held the legal title, to convey to the new trustee. When it became the practice to resort to chancery for the partition of land, what the chancellor really did was, first, to inquire and ascertain *how* the property should be divided, and then to compel the parties to divide accordingly by the execution of mutual conveyances. So when the chancellor undertook the settlement of a disputed boundary, he first ascertained what the true boundary line was, and then compelled the parties by mutual conveyances to establish that as the boundary line. When the chancellor placed property in the hands of a receiver, the latter acquired no title to the property, but possession merely. If he had occasion to assert a title to the property in a court of law, he had to do it in the name of the owner; and if the owner brought an action against him to recover the property, he had no defence to the action, and his only security was in the power of the chancellor to punish for contempt any one who interfered with the possession

By the adoption of this system of procedure, the chancellor was not only enabled to enforce specific performance in the numerous cases where that was obviously either the sole remedy, or the only adequate one, but to give relief in many other cases in which the common-law courts were powerless. Thus the common law can only give the plaintiff, as a rule, what he was absolutely entitled to when he brought his action. If anything then remained to be done by him to perfect his right, or if more time must elapse, or some uncertain event must happen, before his right will accrue, his action must wholly fail; and he cannot even obtain a decision of the questions in controversy. But as the chancellor in any event gives relief by directing and requiring the defendant to do something, there is no technical difficulty in the way of his directing the thing in question to be done at some fixed future time, or upon the happening of some event, or upon the performance of some condition on the part of the plaintiff. So he can make it a condition of giving relief that the plaintiff shall submit to do on his part whatever shall be required of him, and

of his receiver. It is often said to have been one of the functions of the chancellor to set aside, for fraud or other sufficient cause, judgments, awards, accounts stated, conveyances, and contracts; but this is an incorrect use of language. If a judgment had been obtained by fraud, he would enjoin the judgment-creditor from enforcing it; if an award or an account stated was infected with fraud, he would not permit it to be used against the defrauded party, either as a cause of action or as a defence to the original cause of action; if a conveyance of property was obtained by fraud, he would compel a reconveyance of it; if a written instrument purporting to constitute a contract was infected with fraud, he would, in a proper case, require it to be delivered up and cancelled; but he never did nor could set anything aside by his decree. Indeed, it may be stated broadly that a decree in chancery has not in itself (*i. e.*, independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law, and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree. Undoubtedly it has often been said by chancellors that their decrees are equal to judgments at law, but that only means that they will, to the extent of their power, secure for their decrees the same advantages that judgments have by law; it does not mean that a decree is by law equal to a judgment. Again, if a claim be made the subject of an action at law, and judgment be rendered for the defendant upon the merits, the judgment is conclusive evidence that the claim was not well founded, and it will therefore furnish a perfect defence to any future action upon the same claim; but a decree in equity against the validity of a claim is never a defence to an action at law upon the same claim. Here again, however, the chancellor will make his decrees equal to judgments so far as it is in his power to do so; and therefore a decree in chancery against a claim

the plaintiff having so submitted, the decree will direct performance on his part as well as on the part of the defendant. So, too, it is immaterial to the chancellor, so far as regards his ability to deal with a controversy, how many different interests it affects, or how many different parties or sets of parties have to be brought before him; and although every party must in form be a plaintiff or defendant, it is not necessary that any two defendants should be united in interest; and if some of the defendants have the same interest as the plaintiff, it constitutes no objection; and frequently it is immaterial, in a legal sense, which one of several parties is plaintiff in the suit; for in any event the chancellor has only to direct what shall be done, if anything, by each person before him, whether plaintiff or defendant, and upon what terms and conditions, if any; and if some of the defendants require relief, either against the plaintiff or against co-defendants, which cannot be given to them as defendants, the chancellor can have them made plaintiffs by directing them to file a cross-bill. Nor is the power of the chancellor limited to deciding controversies; for if a trustee, or any person occupying a fiduciary position, upon its merits will always be a defence to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as furnishing a sufficient reason why chancery should not again take cognizance of it. Such a decree will also be (what is sometimes called) an equitable defence to any action at law upon the same claim, *i. e.*, the chancellor will enjoin the prosecution of any such action, upon the ground that the plaintiff having elected to make his claim the subject of a suit in equity, and that suit having been defended successfully upon the merits, it is not right that the defendant should be vexed again by the same claim. Accordingly, when A and B demand the same thing of C, and for that reason C, the demand being a legal one, files a bill of interpleader against A and B, and the chancellor decides that the thing demanded belongs to A, and awards it to him, he also directs a perpetual injunction to issue against B to restrain him from suing C at law for the same thing, and that is C's only protection.

Upon the whole, therefore, the weakness of the chancellor's jurisdiction is as conspicuous as its strength; its strength being that it can always command the obedience of suitors; its weakness being that it has substantially no resource beyond commanding such obedience. It should be observed, however, that, while its element of strength is necessary to the existence of the jurisdiction, its element of weakness is not. The chancellor might in the beginning, like the court of admiralty, have been clothed with the same jurisdiction *in rem* as *in personam*; but if he had been, equity would now be a very different thing from what it is, and its machinery would be very different from what it is. If the system were to be constructed anew, probably its element of weakness would be eliminated from it, and if it could be reconstructed in an enlightened manner (a thing which is not at all likely to happen), it would probably be improved. However that may be, any one who wishes to understand the English system of equity as it is, and as it has been from the beginning, must study its weakness as well as its strength.—Note to 2d edition.

refuses to perform his duties, he may be compelled to do so by bill in equity, and the necessity for such a bill may (and most frequently does) arise not from any misconduct in the trustee, but from his being in doubt as to what his duty requires of him, and from his needing the assistance and protection of the court ; in which case he may file the bill himself instead of waiting to have it filed against him. And when such a bill is filed, either by or against the trustee, the plaintiff is entitled thereafter to have the entire trust administered under the direction of the court. In this way, a great amount of administrative business is disposed of by the chancellor ; in England, indeed, it is in this way that the estates of deceased persons are settled and wound up, executors and administrators being *quasi* trustees. Again, it often happens that the court can do a thing itself more easily and effectively than it can compel it to be done by the party concerned ; and when that is so, there is no objection in principle to the court's assuming the duty. In this way, the chancellor exercises an important administrative jurisdiction through the instrumentality of receivers. Thus, whenever it becomes necessary or proper for the chancellor to assume temporary control over the possession, care, and management of property, he may do so by placing it in the hands of a receiver, instead of assuming control over the party in possession.

Of course, however, it must not be supposed that equity in modern times is simply a different system of remedies from those administered in courts of law ; for there are many extensive doctrines in equity, and some whole branches of law, which are unknown to the common-law courts. Indeed, it may be said without impropriety that equity is a great legal system, which has grown up by the side of the common law, and which, while consistent with the latter, is in great measure independent of it. But what should be clearly understood is, that the whole of this growth has its root in the system of remedies adopted. It has often been said that it is the office of chancery to mitigate the rigor of the common law, to supply its deficiencies, to relieve against its technical rules, and to decide controversies according to equity and good conscience ; but it is because of its system of remedies that it is enabled to do this. Thus, the whole system of trusts has grown up in equity, while it is unknown at common law, because the chancellor is able to compel the performance of trusts, and a court of common law is not. So when the estate of a mortgagee has become absolute by the terms of the mortgage, it is idle for a court of law to inquire whether he is bound in justice to reconvey to the mortgagor upon receiving his debt and interest ; but such an inquiry is very material in a court of equity, for, if the conclusion reached is that he is so bound, the court will compel him to do it.

This is the origin of the equitable doctrine that, as a mortgage is designed as a security merely, the mortgagee is entitled to no more than his debt and interest, although the debt was not paid at the time specified in the mortgage; and upon this foundation all suits for the redemption of mortgages rest. But as it would be unjust to compel the mortgagee to wait the pleasure of the mortgagor, the latter will be compelled either to pay the money, or to relinquish all claim to the mortgaged property, within a time fixed by the court; and hence foreclosure suits arise. In this way, nearly the whole subject of mortgages has passed into equity. So if a father, who owns Blackacre in fee and Whiteacre in tail, devises the former to his eldest son, and the latter to his younger son, the former will take them both at law; for he is both the heir at law and the heir in tail of his father, and as such, both Blackacre and Whiteacre have descended to him. As to Blackacre, the father has not attempted to interrupt the course of descent; as to Whiteacre, he has made the attempt, but he has not succeeded. But a court of equity will say the father clearly did not mean that his eldest son should have both Blackacre and Whiteacre, and hence it will put him to his election, *i. e.*, if he insists upon keeping Whiteacre, it will compel him to give the younger son an equivalent out of Blackacre. Hence, the doctrine of election is a purely equitable one.¹ So the rule that whatever ought to have been done will be considered as having been done, is wholly the creature of equity, it being founded upon the principle that, as a court of equity would have compelled performance of the duty, it will put the parties interested, so far as possible, in the same position as if it had been performed. Hence the doctrine of equitable conversion, and other doctrines of a kindred nature.—Langdell, Summary of Equity Pleading, 2d Edit., 27–42.

¹ See reporter's note to *Gretton v. Howard*, 1 Swanst. 409, 425.

PENN v. LORD BALTIMORE.

IN CHANCERY, BEFORE LORD HARDWICKE, C., MAY 15, 1750.

[Reported in *Vesey Sr.* 444.]

THE bill was founded on articles, entered into between the plaintiffs and defendant 10 May, 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent granted 20 June, 2 C. 1, by which the district, property, and government of Maryland under certain restrictions is granted to defendant's ancestor, his heirs and assigns: farther reciting charters or letters patent in 1681, by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stating a title to the plaintiffs derived from James Duke of York, to the three lower counties by two feoffments, both bearing date 24 August, 1682. The articles recite, that several controversies had been between the parties concerning the boundaries and limits of these two provinces and three lower counties, and make a particular provision for settling them by drawing part of a circle about the town of Newcastle, and a line to ascertain the boundaries between Maryland and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 December, 1733. There was beside a provision in the articles, that if there should be a want of a Quorum of commissioners meeting at any time, the party by default of whose commissioners, the articles could not be carried into execution, should forfeit the penalty of £5,000 to the other party: and a provision for making conveyances of the several parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles; what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the Attorney General should be made a party; who now left it to the court to make a decree, so as not to prejudice the right of the crown.

The first objection for defendant was, that this court has not jurisdiction nor ought to take recognizance of it; for that the jurisdiction is in the King and council.¹

LORD CHANCELLOR. I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case,

¹ Only so much of the case is given as relates to this objection.—ED.

as by reason of the nature of it, the great consequence and importance, and the great labor and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate rather than of a single judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence; which will fall in more naturally, and very intelligibly, under the particular points arising in the cause.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this court; the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in *specie*; and more useful in a case of this nature than in most others; because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, viz., the settling and fixing these boundaries in peace, to prevent the disorder and mischief, which in remote countries, distant from the seat of government, are most likely to happen, and most mischievous. Therefore the remedy prayed by a specific performance is more necessary here than in other cases: provided it is proper in other respects; and the relief sought must prevail, unless sufficient objections are shown by defendant; who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered: and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering submits to the jurisdiction: much more when there is a proceeding to hearing on the merits, which would be conclusive at common law: yet a court of equity, which can exercise a more liberal discretion than common-law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears. It is certain, that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council; and it is rightly compared to the cases of the ancient Commotes and Lordships Marches in Wales; in which if a dispute is between private parties it must be tried in the Commotes or Lordships; but in those disputes, where neither had jurisdiction over the other it must be tried by the King and council; and the King is to judge, though he might be a party; this question often arising between the crown and one Lord-Proprietor of a province in America; so in the case of the Marches it must be determined in the King's court, who

is never considered as partial in these cases; it being the judgment of his judges in B. R. and Chancery. So where before the King and council, the King is to judge, and is no more to be presumed partial in one case than the other. This court therefore has no original jurisdiction on the direct question of the original right of the boundaries ; and this bill does not stand in need of that. It is founded on articles executed in England under seal for mutual consideration; which gives jurisdiction to the King's courts both in law and equity, whatever be the subject matter. An action of covenant could be brought in B. R. or C. B. if either side committed a breach : so might there be for the £5,000 penalty without going to the council. There are several cases, wherein collaterally, and by reason of the contract of the parties, matter out of the jurisdiction of the court originally will be brought within it. Suppose an order by the King and council in a cause, wherein the King and council had original jurisdiction; and the parties enter into an agreement under hand and seal for performance thereof : A bill must be in this court for a specific performance ; and perhaps it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. The King in council is the proper judge of the original right ; and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right: but if that agreement is disputed, it is impossible for the King in council to decree it as an agreement. That court cannot decree *in personam* in England unless in certain criminal matters; being restrained therefrom by Stat. 16 Car., and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement; and being within the jurisdiction of this court,¹ which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it. To go a step farther; as this court collaterally and in consequence of the agreement judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical court just as a court of law would maintain an action for damages in breach of covenant.²

¹ 4 Inst. 213.

² Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. 2 Story, Eq.,

LORD PORTARLINGTON v. SOULBY.

IN CHANCERY, BEFORE LORD BROUGHAM, C., APRIL 15, 1834.

[Reported in 3 *Mylne & Keen* 104.]

Mr. Rolfe moved that an injunction granted by the Vice-Chancellor, whereby the defendants were restrained from suing in Ireland upon the bill of exchange in the pleadings mentioned, might be dissolved.

The Solicitor-General (*Sir C. Pepys*) and *Mr. Bagshawe*, for the plaintiff, opposed the motion.

The grounds on which the application was supported, on the one side, and resisted, on the other, are fully stated in the judgment.

The LORD CHANCELLOR. This was a motion to dissolve an injunction, granted to restrain the defendants from suing in Ireland upon a bill of exchange for £1,000 accepted by the plaintiff, payable to a person of the name of Aldridge, by whom it was indorsed and passed away to Mr. Brook, a retail dealer in wines, and by him to the defendants.

The ground of the injunction is, that the bill was given by Lord Portarlington for money lost at play.

Messrs. Soulby are respectable wine merchants, who had previously had dealings with Mr. Brook. In 1831 Mr. Brook, having occasion for a loan of money, applied to them, and proposed to them to discount the bill in question, and Messrs. Soulby thereupon advanced him £700, Brook agreeing to take £300 worth of wine to make up the residue, and at the same giving his own acceptance for the sum so advanced. The wine never was delivered, except to the value of about £38.

Now upon this part of the transaction it may be remarked, that a party obtaining the loan of money, and not merely giving a security for repayment of the sum advanced to him, but giving another security to the amount of nearly half as much more, and then taking goods and not money to that whole amount, especially when he does not put his own name on the back of the bill, affords, *prima facie*, a proof of his embarrassment,—of the person so raising money being put to shifts, and even of his having some knowledge, which he withholds, of the origin of the security. This ought to excite suspicion, and to cause inquiry; nor can any one doubt that Messrs. Soulby, as prudent men,

sect. 899; *Miller v. Sherry*, 2 Wall. 249; *Penn v. Lord Baltimore*, 1 Ves. 444; *Mitchell v. Bunch*, 2 Paige (N. Y.), 606.—*Mr. JUSTICE SWAIN*, *Phelps v. McDonald*, 99 U. S. 298, 308.—ED.

must have questioned Mr. Brook as to how he came into possession of the bill bearing Lord Portarlington's name upon it.

But although there is sufficient ground for holding that the bill was taken in circumstances which were calculated to raise suspicion, and ought to have occasioned inquiry, still there is no necessity for proving such a case, much less for showing that the defendants knew of the illegal consideration, in order to sustain the injunction. The fact of the illegality of the consideration is distinctly alleged, with the circumstances of the gambling transaction ; and to this allegation, supported by the plaintiff's oath, no contradiction whatever is given in the answer ; nor do the defendants, who rely on their affidavit, as the answer has been excepted to and the exceptions allowed, aver anything but their own ignorance, and their belief of their father's ignorance of the origin of the bill; and they produce no affidavit at all from Brook, a circumstance of itself nearly decisive, both that the case made by the bill is true, and that Brook was aware of the fact. Nothing else can account for his not joining in an affidavit to answer that of the plaintiff, his interest being clearly identical with Messrs. Soulby's. It is further to be observed, that the defendants show by their affidavit that they have been in correspondence with Aldridge, and yet they do not swear that they are now ignorant of the illegal consideration, or of Aldridge keeping a gaming-house, but only that they knew it not in the year 1831, when they took the bill.

The case, therefore, is reduced to this. An illegal consideration distinctly stated, and not denied, with several circumstances leading to the belief, that the defendants now know such to have been the origin of the bill; and several circumstances also showing that it was taken by their late partner under suspicion, and yet without inquiry.

It is, then, impossible to doubt that the injunction was well granted, and the whole question would be free from difficulty but for one peculiarity in the case ; the action is brought in Ireland, and the interposition of this court is sought to stop proceedings there. That this is an unusual proceeding must be admitted, but I do not see any ground for questioning the competency of it.

Soon after the restoration, and when this like every other branch of the court's jurisdiction was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of *Love v. Baker*.¹ In *Love v. Baker* it appears, that one only of several

¹ 2 Freem. 125 ; 1 Ch. Ca. 67.

parties who had begun proceedings in the court of Leghorn was resident within the jurisdiction here, and the court allowed the subpoena to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other judges; but the report adds, “*sed quære*, for all the bar was of another opinion”; and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given, that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding.

Accordingly this case of Love *v.* Baker has not been recognized or followed in later times. Two instances are mentioned in Mr. Hargrave’s collection of the jurisdiction being recognized; and in the case of Wharton *v.* May,¹ which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment, or carrying on any action, in what is called “the Court of Great Session in Scotland,” meaning, of course, the Court of Session.

I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of Campbell *v.* Houlditch, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the court of session in Scotland. From the note which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority.

In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad;—if, for instance, as in Penn *v.* Lord Baltimore,² it can decree

¹ 5 Ves. 71. See also Kennedy *v.* Earl of Cassillis, 2 Swans. 313; Bushby *v.* Munday, 5 Mad. 297; Harrison *v.* Gurney, 2 J. & W. 563; Beauchamp *v.* Marquis of Huntley, Jac. 546.

² 1 Ves. Sen. 444.

the performance of an agreement touching the boundary of a province in North America ; or, as in the case of *Toller v. Carteret*,¹ can foreclose a mortgage in the isle of Sark, one of the channel islands ; in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act in *pais*, or the instituting or prosecution of an action in a foreign court.

It is upon these grounds, I must add, and these precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in the year 1682, in *Arglasse v. Muschamp*,² and again by Lord Macclesfield, in the year 1724, in *Fryer v. Bernard*,³ of granting a sequestration against the estates of a defendant situated in Ireland. The reasons given by that great judge in the latter case plainly show that he went upon a ground which would now be untenable, viz., what he terms the superintendent power of the courts in this country over those in Ireland; and indeed he supports his order by expressly referring to the right then claimed by the King's Bench in England to reverse the judgments of the King's Bench in Ireland. This pretension, however, has long ago been abandoned, and has indeed been discontinued by parliamentary interposition; and the power of enforcing in Ireland judgments pronounced here, and *vice versa*, is at the present time the subject of legislative consideration.

As to the argument that the Courts of Equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country ; for it might be said that the Court of Exchequer has the power of restraining, and therefore there needs no interposition of the Court of Chancery. It suffices to say that the court in which the action is brought is a court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth.

I am, therefore, of opinion, that this injunction was well issued, and that it must be continued, and that this motion must be refused with costs.

¹ 2 Vern. 494

² 1 Vern. 75.

³ 2 P. Wms. 261.

PLATT *v.* WOODRUFF.

IN THE COMMISSION OF APPEALS OF NEW YORK, JANUARY TERM,
1875.

[*Reported in 61 New York Reports 378.*]

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial.

This was an equity action, brought for the purposes hereinafter stated.

Defendants, the Bank of Dansville, in January, 1867, commenced two actions in the Supreme Court, one against Warren Leland, plaintiff's assignor, to recover the amount due upon his acceptance of a draft made upon him by the defendant William W. Leland, on the 6th of June, 1866, for \$814.73, payable to the order of the defendant Woodruff at three months' sight; the other against the said Warren Leland and the defendants William W. Leland and Edward S. Hardy, to recover the amount due on a draft made on the 18th of April, 1866, by the defendant William W. Leland upon the defendant Hardy for \$11,800, payable to the order of Warren Leland six months after date, accepted by Hardy and indorsed by Warren Leland. The place of trial in each of these actions was Livingston County. Warren Leland, after appearing and answering the complaint in each of these actions, and in March of the same year commenced this action, designating Westchester County as the place of trial, setting out in his complaint substantially the same facts, the existence of which he alleged in his answers as a defence to the actions brought by the Bank of Dansville, praying, amongst other things, that the two drafts sued upon by the bank be delivered up and canceled; and that, during the pendency, and until the final determination of this action, the bank might be restrained from the further prosecution of the two actions thus commenced. In furtherance of the object of this action, said Warren Leland, on the 16th of April, 1867, obtained, from one of the justices of the Supreme Court in New York, an injunction order restraining the bank from the further prosecution of its actions during the pendency of this action, or until the further order of the Supreme Court. This order was afterwards, at a Special Term of the Supreme Court, held in the county of Westchester in June of the same year, vacated as having been "irregularly and improperly granted." The issues in the two actions brought by the bank were then each regularly noticed for trial at the then next Livingston Cir-

cuit, to be held on the twenty-first of the following October. On that day (October twenty-first), a second order was obtained from another judge of the Supreme Court, again restraining the bank from further prosecuting the two suits during the pendency of this action, or until the further order of the court. This order was served on the defendants' attorney, in Buffalo, on the twenty-sixth, and on the cashier of the bank, at Dansville, on the thirtieth of October. On the second day of the following November, and during the Livingston October Circuit, the two actions brought by the bank were each regularly reached on the calendar; and the trial of each of them proceeded into a decision by the court in favor of the bank for the sum demanded in each action. At a Special Term of the Supreme Court held in the county of Westchester on the 26th of November, 1867, the injunction order of the twenty-first of October was, after hearing both parties, also vacated as having been "irregularly and improperly" granted. And, after the order was thus vacated, and on the nineteenth of the following December, upon filing the decision of the court at Circuit, judgment was entered in accordance therewith. These judgments were each held by the referee in this action to be void, and judgment was rendered herein as if they had not been recovered.

Douglass Campbell for the appellant.

A. G. Rice for the respondents.

GRAY, C. It does not appear from the record why these injunction orders were held to have been "irregularly and improperly granted." It may be that the judge holding the terms at which they were vacated was of the opinion subsequently expressed at a General Term,¹ that such an order could not be granted by a judge in an action pending in one judicial district to restrain the proceedings involving the same subject-matter between the same parties pending in another judicial district. That it can is now settled.² While the common-law and equity courts were separate tribunals in this State, a court of law did not hold a party to a suit pending in it who should proceed in his suit in violation of an injunction of a court of chancery as even irregular in his practice, but left him to the sufficient power of that court to vindicate its own authority.³ And now that law and equity are separately administered by the same tribunal, each judge having equal power, as well to grant as to vacate an injunction order, it does not follow that a judge holding a purely

¹ *Schell v. The E. R. Co.*, 51 Barb. 368.

² *The E. R. R. Co. v. Ramsey*, 45 N. Y. 637.

³ *Grazebrook v. McCredie*, 9 Wend. 437, 442.

law court is divested of his jurisdiction to proceed in an action pending in it, because of an order made by another judge of the same court, in the exercise of his equity powers, forbidding a party in a law suit from further prosecuting his action.¹ A judge at Cir-

¹ It is idle to say that the distinction between legal and equitable actions has been wiped out by the modern practice. It is true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action or defence must be truly stated; that fictions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out (Reubens *v.* Joel, 13 N. Y. 488; Goulet *v.* Asseler, 22 Id. 225).—EARL, J., Gould *v.* Cayuga County National Bank, 86 N. Y., 75, 83.

What are the distinctions between actions at law and suits in equity? The most marked distinction obviously consists in their different modes of relief. In the one, with a few isolated exceptions, relief is invariably administered, and can only be administered, in the form of a pecuniary compensation in damages for the injury received; in the other, the court has a discretionary power to adapt the relief to the circumstances of the case. By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them. The legislature may, unless prohibited by the constitution, enact that no court shall hereafter have power to grant any relief, except in the form of damages, and thereby abolish all suits in equity; or that all courts shall have power to mould the relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class. To illustrate by a single case: they may provide that where a vendor of land, who has contracted to sell and received the purchase money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for a specific performance; but it is clearly beyond the reach of their powers to make these two remedies the same. Another leading distinction between common-law actions and suits in equity consists in their different modes of trial. The former are to be tried by a jury, the latter by the court. Can the legislature abolish this distinction? They might, but for the restraints of the constitution, abolish either kind of trial, or re-classify the classes to which they apply; but they cannot make trial by jury and trial by the court the same thing. It is plain that the only way in which the declaration contained in § 69, that "there shall be in this State hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs," can be made good, is by abolishing both the form of trial and the mode of relief in one or the other of the two classes of actions. When this is done, and not till then, shall we have one homogeneous form of action for all cases. Has the legislature power to do this? The constitution contains the following provisions, viz.: "There shall be a supreme court, having general jurisdiction in law and equity" (Art. 6, § 3). The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed (§ 5). The testimony in equity cases shall be taken in like manner as in cases at law (§ 10). Will it be contended, in the face of these provisions, that the legislature has power to abolish the jurisdiction of the courts, either at law or in equity?

cuit would, doubtless, if the existence of such an order should be properly brought to his knowledge, heed it; and would not, unless under very extraordinary circumstances, permit a party to disregard it. It does not appear in this case that the judge holding the Circuit

The constitution gives to the supreme court general jurisdiction both in law and equity. Can this be taken away? It authorizes the legislature to "alter and regulate" both jurisdictions. Does this mean that it may abrogate them?

It is, in my judgment, clear that the legislature has not the constitutional power to reduce all actions to one homogeneous form; because it could only be done by abolishing trial by jury, with its inseparable accompaniment, compensation in damages, which would not only conflict with art. 1, § 2, which preserves trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable; or, by abolishing trial by the court, with its appropriate incident, specific relief, which would destroy all equity jurisdiction and convert every suit into an action at law.

If we recur to the proceedings of the convention which framed the constitution, all doubts as to its true construction in this respect will be removed. The committee on the judiciary reported on the 1st day of August, and in that report, § 3, providing for a supreme court, reads as follows: "There shall be a supreme court, having the same jurisdiction in law and equity which the supreme court and court of chancery now have, subject to regulation by law." On the 10th of August, a member moved to add to the report the following: "And to the end that ultimately the jurisdiction of law and equity may not be separately administered, and that the two may be blended into one harmonious system, the legislature shall provide by law, as far as may be, a common form of procedure for remedies arising under both jurisdictions." This proposition was afterwards modified so as to read: "The legislature shall provide by law for a uniform system of procedure in the administration of justice in civil cases, without regard to the distinctions heretofore had between different forms of action and different jurisdiction in law and equity." After a week's debate upon this and kindred propositions, calling forth most of the eminent legal talent and learning in the convention, all the propositions looking to a blending of the modes of proceeding in the two jurisdictions were rejected, and the section was adopted as it now stands in the constitution (vide Debates in Conv., Atlas ed., 481 to 582). Thus it will be seen that section 69 of the Code is an attempt to exercise a power which the convention, in framing the constitution, expressly refused to confer upon the legislature.

In the case of *Parsons v. Bedford and al.* (3 Peters, 433), the Supreme Court of the United States put a construction upon that clause in our national constitution (art. 3, § 2) which declares: "That the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc., taken in connection with the 7th amendment, which provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise reëxaminable in any court of the United States than according to the rules of the common law." The legislature of Louisiana had enacted "That when any cause shall be submitted to a jury to be tried, the verbal evidence shall in all cases, where an appeal lies to the supreme court, if either party

was informed of the existence of this order; or, being informed, he did not make it a condition of his hearing the cause that the bank should not proceed to judgment in it until the order should be vacated; but, whether he knew or did not know that such an order

require it, and at the time when the witnesses shall be examined, be taken down in writing by the clerk of the court, in order to be sent up to the supreme court, to serve as a statement of facts in case of appeal." And by a law of the United States, passed the 26th of May, 1824, the mode of practice pursued in the courts of Louisiana is directed to be followed in the courts of the United States in that State. Upon the trial of the cause in the United States district court, before a jury, it being a common-law action to recover a debt, the defendant applied to the court to have the testimony taken down pursuant to the statute and the practice in that State, with a view to an appeal, which the judge refused, upon the ground, as it would seem, that it was a common-law action, and the facts could not be reviewed. Upon writ of error to the supreme court, it was argued for the plaintiff in error that there was no distinction between law and equity in the State of Louisiana; and that if that distinction was recognized in the United States court, in proceedings in that State, it would become necessary to introduce the forms of the common law there, which would be productive of great inconvenience. But the court held that the distinction, being recognized in the constitution, could not be abolished by State legislation nor disregarded by the courts. Judge Story says: "The constitution has declared, in the 3d article, that the judicial power shall extend to all cases in law and equity, etc." "It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at *common law*, the natural conclusion is, that this distinction was present to the minds of the framers of this amendment. By *common law*, they meant what the constitution denominated in the 3d article 'law'; not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies were administered." This case is a direct authority to show, what, indeed, is plain without authority, that the constitution, by conferring jurisdiction in "law and equity," has not only recognized the distinction between them, but placed that distinction beyond the power of the legislature to abolish; which, as has been shown, it could only do by abolishing one or the other of the two jurisdictions.

But the legislature, in the specific provisions adopted by it, has not attempted to carry into effect the general declaration made in § 69. By § 253, it is provided that "An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in § 266, or a reference be ordered, as provided in §§ 270 and 271"; and by § 254, "that every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in §§ 270 and 271." Again, § 275 provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case the

existed, he had jurisdiction of the subject-matter and of the parties, of which he was not ousted by an order directing the bank to refrain from the further prosecution of its actions. That order was not operative upon the court, but upon the bank, who, unless purged of its contempt, might have been compelled to relinquish all advantage of its proceedings subsequent to the service of the order. The judgments were not void.¹

This renders the examination of other questions involved unnecessary, as the order of reversal must, upon this ground, be affirmed.

All concur.

Order affirmed, and judgment absolute ordered against plaintiff.

court may grant him any relief consistent with the case made by the complaint and embraced within the issue"; and § 276, that "whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have *heretofore* recovered for the same cause of action."

Instead of being abolished, the essential distinctions between actions at law and suits in equity are by these sections expressly preserved. Actions at law are to be tried by a jury; suits in equity by the court. Damages are to be given, as heretofore, in the former, and specific relief in the latter. The only change, in classification even, is in respect to certain actions for a divorce, which are made in all cases triable by jury.

The same distinction is kept up in the provisions in regard to costs. In the cases mentioned in § 304, which are actions at law, costs are allowed, of course; while in other actions, that is, in equity suits, they rest, by virtue of § 306, as formerly, in the discretion of the court.—SELDEN, J., *Reubens v. Joel*, 13 N.Y. 488, 493-498.—ED.

¹ It appeareth to our understanding, by the cause of error and attaint in the same statute, what jurisdiction it was that the statute meant to restrain, viz.: such jurisdiction as did assume to reverse and undo the judgment, as error or attaint doth, which the Chancery never doth, but leaves the judgment in peace, and only meddles with the corrupt conscience of the party; for if the Chancery should assume to reverse the judgment in the point adjudged, it is void, as appeareth 39 E., 3 f. 14.—Report of Sir FRANCIS BACON and others, Cary, 179.—ED.

THE MAYOR AND CORPORATION OF YORK *v.* SIR LIONEL PILKINGTON.

IN CHANCERY, BEFORE LORD HARDWICKE, C., MAY 14, 1742.

[Reported in 2 Atkyns 302.]

THE plaintiffs claim the sole right of fishing in the river Ouse ; the defendant claims the right likewise; a bill and cross bill were brought, to establish their several rights.

While these suits were depending, the plaintiffs caused the agent of the defendant to be indicted at York sessions, where they themselves are judges, for a breach of the peace, in fishing in their liberty.

A motion was made on behalf of the defendant, to stop the prosecution.

LORD CHANCELLOR. This court has not originally, and strictly, any restraining power over criminal prosecutions; and, in this case, if the defendant had applied to the Attorney-General, he would have granted a *noli prosequi*.

For when a complaint is grounded on a civil right, for which an action of trespass would lie, the Attorney-General of course grants a *noli prosequi*.

This is a complaint merely for fishing in the river, without any actual breach of the peace, which the mayor and corporation say, is a trespass upon them.

If it could be made to appear at law, that the plaintiffs were both judges and parties, it might come out to be *coram non judice*, but it might be difficult to make out this.

If actions of trespass had been brought *vi et armis*, this court would have stopped them ; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment.

Supposing it was a suit for a right of land where entries had been made, and the bill was brought to quiet the possession, and after that they prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace, and is also a civil right, this court would certainly stop the proceedings upon such indictment.

Where parties submit their right to the court, they have certainly a jurisdiction, and may interpose.

Therefore I will make an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause and further order.¹

¹ Why ought a Court of Equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came

SAULL v. BROWNE.

IN THE COURT OF APPEAL, NOVEMBER 18, 1874.

[Reported in *Law Reports*, 10 Chancery Appeals 64.]

SARAH SAULL, the executrix of Thomas Saull, filed the bill in this suit against her co-executor, William Saull, and Browne and Godfrey, two other persons who were partners with the executors in a wine and spirit business. The bill alleged divers acts of misconduct on the part of Browne and Godfrey, and that, acting in collusion, they had formed a scheme for transferring the business so as to injure the plaintiff; and the bill prayed for a sale of the partnership property, and for accounts, and for payment of all profits made, and compensation for losses occasioned by the removal of the business to another place of business. The defendants answered in January, 1873.

On the 13th of November, 1874, Sarah Saull obtained from the Police Court at Worship Street a summons against Browne and Godfrey, for unlawfully conspiring to defraud her of her just share in the partnership business.

An application was then made to the Master of the Rolls on behalf of Browne and Godfrey for leave to give short notice of motion to restrain the proceedings on the summons; but the Master of the Rolls thought he should have no jurisdiction to make the order, and refused leave.

The motion was now, by leave, made before the Court of Appeal.

Mr. Fischer, Q.C., and *Mr. Locock Webb* for plaintiff.

Mr. Fry, Q.C., and *Mr. Ince* for defendants.

LORD CAIRNS, L. C. I should be unwilling to express any doubt that there may be cases in which criminal proceedings instituted by a party to a suit in this court are so identical with the civil proceedings as to induce this court to order that the same person shall not at the same time pursue his remedy in this court and pursue another remedy which ranges itself under the head of criminal jurisdiction. No doubt there may be such a case, and the authorities which have

before me in *Saull v. Browne* (*Law Rep.* 10 Ch. 64), where I declined to interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in *Mayor of York v. Pilkington* (2 Atk. 302).

My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a Court of Equity has interfered in criminal proceedings. I do not say that the court might not interfere in a possible case, but as a general rule it will not.—JESSEL, M. R., *Kerr v. Corporation of Preston*, 6 Ch. Div. 463, 467.—ED.

been referred to, when properly understood, entirely come under the description which I have given.

In the present case the bill was filed by a plaintiff alleging various matters as to a partnership with the defendants, and asking for the interference of the court for the protection of the property of the partnership. I make no observation as to the prospects of success in this suit: with that I have now nothing to do, and as to that of course I know nothing. But I find that the same plaintiff has taken out a summons before a police magistrate against the defendants, or some of them, alleging that they have entered into a conspiracy, and in the course of it have injured the plaintiff as to the partnership property. That summons is based entirely upon criminal proceedings, and the object is to obtain the punishment of the persons charged with the conspiracy. It appears to me that the thing which is sought by this summons is different from anything which could be obtained in this court. No doubt the criminal court may have to consider the question of property, but the object of the summons is not to obtain relief as to the property, but to obtain punishment for the defendants in their persons.

We put it to the defendants' counsel whether, if before the suit was commenced a summons of this kind had been taken out, this court could interfere with the proceedings, and it was admitted that the court could not interfere. So also it cannot be doubted that, after relief has been given by this court in this suit, a criminal court might be applied to, and the punishment of the defendants might be obtained. If, then, such proceedings might be taken either before or after the suit, it is difficult to see why they should not be taken at the same time and concurrently with the suit. There is no inconsistency in allowing both proceedings, as nothing which takes place on the summons can be evidence in the suit.

It would be in the discretion of the magistrate whether to hear the case or not; but that is for his discretion, not for ours. Or, if the summons should result in an indictment, it will be for the Attorney-General to consider whether such a proceeding ought to be allowed to go on; but that, again, rests in his discretion, not in ours.

There is no authority for us to make such an order, and the motion must be dismissed with costs.

SIR W. M. JAMES, L.J. I am of the same opinion. In old times this court might well have been asked to interfere with criminal proceedings taken against an officer of the court for the purpose of harassing him, as he had no other sufficient protection. There is an old decision referred to in the note to *Francklyn v. Colhoun*,¹ that resist-

¹ 3 Sw. 276, 280, n.

ing and killing a sequestrator was not murder. At that time, therefore, the court had cause to interfere with criminal proceedings, but the cause for so doing has now ceased. The authority produced to us, *Mayor of York v. Pilkington*,¹ is, as far as I know, the only case in which this court has made such an order as we are now asked to make; and even that case is not exactly similar, because it appears that the same right would there have been tried in both courts.

SIR G. MELLISH, L.J. I am of the same opinion. The power of this court to interfere with a criminal proceeding can only arise when the criminal proceeding is of the same nature as the civil proceeding. The only case cited was of that nature, but here the proceedings are quite different, and this court is not called upon to interfere.

THE EMPEROR OF AUSTRIA *v.* DAY AND KOSSUTH.

IN THE COURT OF APPEAL, JUNE 7, 1861.

[Reported in 3 *De Gex, Fisher & Jones* 217.]

THIS was an appeal from the whole of a decree of Vice-Chancellor STUART, restraining the defendants from making notes purporting to be notes of the Hungarian State, and ordering them to deliver up to the plaintiff the notes already made and the plates used for printing them.

The case made by the bill was in substance as follows:

That the plaintiff was King of Hungary, and as such had the exclusive right of authorizing the issue in Hungary of notes to be circulated in Hungary as money, and also the exclusive right of authorizing the royal arms of Hungary to be affixed to any document intended to be circulated in that country.

That nearly the whole of the circulation of Hungary consisted of notes of the National Bank of Austria, issued under the authority of the plaintiff as Emperor of Austria and King of Hungary, which circulated in Hungary as money, and were for various sums from one florin upwards.

That the defendants Day & Sons (the well-known lithographers) had by the direction of the defendant Kossuth prepared plates for printing notes purporting to be notes of the Hungarian nation or State, for various sums of money, and which were intended to be circu-

¹ 2 Atk. 302.

lated as money in Hungary, and that they were engaged by the direction of Kossuth in printing such notes from the plates.

That the body of each note was in the Hungarian language, and had on the border, in the German and Sclavonian and other languages, the amount for which it purported to be a note, and at the bottom a print of the royal arms of Hungary. The body of a one florin note, when translated, was as follows:

“One florin.

“This monetary note will be received in every Hungarian State and public pay office as

“One florin in silver.

“Three zwanzigers being one florin, and its whole nominal value is guaranteed by the State.

“In the name of the nation,

“KOSSUTH, LOUIS.”

That the total amount of these notes which was being prepared was upwards of 100,000,000 florins. That Day & Sons had in their possession a large quantity of them entirely or nearly completed, and, unless restrained by the court, would deliver them to Kossuth. That Kossuth intended, as soon as he received them, to send them to Hungary and endeavor to introduce some of them into circulation there, and use the remainder for other purposes in Hungary, in violation of the rights and prerogative of the plaintiff as king of that country, and, amongst other purposes, for the promotion of revolution and disorder there. That the plaintiff had never authorized the manufacture of the notes or the use of the royal arms of Hungary thereon ; and that the introduction of the notes into Hungary would create a spurious circulation there, and by that and other means cause great detriment to the State and the subjects of the plaintiff. That Day & Sons had notice of the purpose for which the notes were intended, and of Kossuth's want of authority to prepare or issue them.

The bill prayed that Day & Sons might be decreed to give up to the plaintiff the plates, and any documents printed or lithographed therefrom, and any other documents in their possession purporting to be notes of the Hungarian State or nation, or notes with the royal arms of Hungary thereon, and for an injunction restraining Day & Sons from printing or delivering to Kossuth any such notes.

M. Kossuth by his affidavits denied that the plaintiff was *de jure* King of Hungary, and entered at length into the grounds of this contention. He also denied the plaintiff's being *de facto* King of Hungary on the ground that he had not been crowned King of Hungary, as was required by the fundamental laws of that country. He asserted

that the emperor had no authority to issue notes without the consent of the diet; that the diet had, in 1848, authorized him, Kossuth, when minister of finance to Ferdinand V., to issue notes, but had never given such authority to any one else. That such notes were issued, bearing his own official signature as minister of finance, but did not resemble the notes now in question. That the arms of Hungary were not royal but national, and that any Hungarian might lawfully use them. That the use of them in Hungary without royal authority was common; and that they were introduced into the notes, not to give them any authenticity, but merely as a national emblem. He proceeded to say, “It is not true, but it is wholly and entirely contrary to the truth, that I have intended, as soon as I receive the notes, falsely in the said bill called spurious notes, to send them to Hungary, and to sell some of them for divers sums of money to any persons resident there or elsewhere, and by this and other means to introduce the same into circulation in Hungary. . . . I affirm and declare the fact to be, that, the present state of Europe and of the Austrian government being such as to make the happening of great changes in the relations of lawful right and the dominion of force seem not only possible but probable, I deemed it to be my duty to take such means as I was able to meet such an emergency as might then probably arise, and to prevent the subjects and State of Hungary from suffering the detriment that would necessarily follow from the want of a sufficient means of circulation as money, and I have accordingly had the notes in the said bill named, prepared, and made ready, but had already before the filing of the said bill made provision for their safe keeping in England until the happening of the emergency which could alone make the use of them in Hungary to be consistent with events. And I affirm and declare, that I neither have attempted, nor have ever had the intention to attempt, to introduce the said notes into Hungary, so long as the present condition of forcible dominion exists there. What the plaintiff calls ‘revolution,’ but which will in fact be the restoration of the laws and rights of Hungary, must itself have happened in Hungary before the notes in the said bill named can acquire the value of which the plaintiff expresses so much fear, through their circulation in the kingdom of Hungary.”

It appeared that the notes in question were not similar in appearance to any notes circulating in Hungary.

The Vice-Chancellor STUART having made a decree according the prayer of the bill, the defendants Kossuth and Day & Sons severally appealed.

Mr. Roundell Palmer, Sir H. M. Cairns, and Mr. Cotton, for the plaintiff, in support of the decree.

Mr. Collier, Mr. Giffard, Mr. C. T. Simpson, and Mr. Westlake, for M. Kossuth, and *Mr. Bacon and Mr. Wickens,* for Messrs. Day.

THE LORD CHANCELLOR. I must confess that when I first read from the short-hand writer's notes the judgment of the Vice-Chancellor in this case, serious doubts entered my mind whether it could be supported. The injunction appears to be ordered with a view "to prevent an injury of a public kind to what the plaintiff asserts to be his legal rights, claimed by him as the acknowledged possessor of the sovereign power in a foreign State at peace with this kingdom." The printed paper manufactured by the defendants, "purporting to represent public paper money of Hungary," is said to be intended "to be circulated at some future time as the public paper money of Hungary, in exercise of some contemplated power hostile to that of the plaintiff, and intended to supersede it." The question is stated to be "whether the defendants can be allowed to continue in possession of this large quantity of printed paper, manufactured and held by them for such a purpose? or whether the plaintiff has the right which he claims to be protected against the invasion of the defendants, and to have delivered up to him what has been thus prepared and made ready to be used for a purpose hostile to his existing right?" His Honor goes on to observe that "the regulation of the coin and currency of every State is a great prerogative right of the sovereign power, recognized and protected by the law of nations, and to be recognized as a legal right, because the law of nations is part of the common law of England." He adds that "the manufactured paper in the possession of the defendants ready to be used for a purpose adverse to the existing right of the plaintiff, and being made for no other purpose, and not being capable of being used for any other purpose, except one hostile to the sovereign rights of the plaintiff; and not being property of a kind which, like warlike weapons, may be lawfully used for other purposes, if the court were to refuse its interference, the refusal would amount to a decision that it has no jurisdiction to protect the legal right of the plaintiff." The Vice-Chancellor seems to grant the injunction as a protection of the prerogatives of the plaintiff as King of Hungary, and to have chief regard to the allegation in the plaintiff's bill, that the notes were to be used in Hungary "in violation of the rights and prerogative of the plaintiff as King of that country, for the promotion of revolution and disorder there." The notes are supposed to differ from "warlike weapons" only in this, that warlike weapons may be lawfully used for legitimate purposes; whereas the notes can only be used in hostility to the rights of the plaintiff as King of Hungary, leading to the inference that if there were clear proof of "munitions of war" being manufactured and kept in this

country for the express purpose of fitting out a warlike expedition against Venice or any other part of the Austrian dominions, the Court of Chancery would grant an injunction against such a use of them, and would order them to be delivered up to be destroyed.

However, in arguing the appeal in this court, the counsel for the plaintiff have entirely repudiated any claim to the injunction on the ground of a mere invasion of any prerogative of the plaintiff as a reigning sovereign, or of the notes being to be used to effect a revolution, or for any political purpose; and they have very freely admitted that this court has no jurisdiction to interfere merely with a view to prevent revolution, and that it is only to prevent an injury to property that in a case like this its aid by injunction can be invoked.

The appellants first contend that the bill is demurrable, making no case for the relief sought, even if its allegations be admitted to be true. But on this point I can entertain no doubt ; for discarding all that the bill says about "revolution" and "hostility to the rights of the plaintiff as sovereign of Hungary," it alleges (what perhaps might have been assumed) that he has the privilege of authorizing the issue in Hungary of notes for payment of money to be circulated in that country as money ; that the circulation of Hungary consists of notes of the national bank of Austria, issued under his authority as Emperor of Austria and King of Hungary ; that the defendants have prepared notes exceeding in amount one hundred millions of florins, which, although not imitating or meant to resemble the notes of the bank of Austria, profess to be notes of the kingdom of Hungary and guaranteed by the State, and to be signed, in the name of the Hungarian nation, by the defendant Louis Kossuth ; that he intends as soon as he receives these spurious notes to send them to Hungary and to introduce them into circulation there, and that "the introduction of the said notes into Hungary will create a spurious circulation there and thereby cause great detriment to the State and to the subjects of the plaintiff."

Now I am clearly of opinion that the plaintiff here states unlawful acts and intentions of the defendants, by which, if not prevented, a damage will be done to the property of the plaintiff as sovereign, and to the property of his subjects whom he has a right to represent in an English court of justice.

I am next to consider how far these allegations are substantiated by evidence. We have an admission that the plaintiff is *de facto* Emperor of Austria and King of Hungary ; that as such he has been recognized by Queen Victoria, our gracious sovereign, and that as such he has now an ambassador accredited and received at her court. The objections to his title may be canvassed in the Diet at Pesth, but

they cannot be listened to in an English court of justice. We are not at liberty to inquire into the pretended superior title of his father or of the late emperor, said to be still alive. If the present Emperor of the French were suing here as a plaintiff, should we permit any claim to the sovereignty of France to be made on behalf of the Comte de Chambord or of the Comte de Paris, or suffer any inquiry into the *coup d'état*, by which the republic was overturned in 1851, or the fairness of the subsequent election of his imperial majesty by universal suffrage?

The right of issuing notes for payment of money, as part of the circulating medium in Hungary, seems to follow from the *jus cudenda moneta* belonging to the supreme power in every State. This right is not confined to the issue of portions of the precious metals, of intrinsic value according to their weight and fineness, but under it portions of the coarser metals or of other substances may be made to represent varying amounts in value of gold and silver, for which they may pass current. It is in evidence that the national bank of Austria, by the authority of the Emperor, does issue notes which form the circulating medium of Hungary, and that from this arrangement a profit accrues to the Emperor. Objection is made that in Hungary it is unlawful or unconstitutional to issue such notes to pass as money and to be a legal tender, without the authority of the Diet; but they might pass as money without being a legal tender, and as *de facto* they are a legal tender according to the law administered in Hungary, we can hardly inquire in an English court of justice as to whether this is a stretch of prerogative. I do not feel justified in following the advice of M. Kossuth's counsel, that this court should punish the Emperor of Austria for his arbitrary rule, by refusing the protection which he solicits for the monetary property of himself and his subjects in Hungary. If any complaint should be made in a foreign court of justice of an injury to our currency, consisting of Bank of England notes, we should hardly expect to be nonsuited on account of an alleged over-issue contrary to Sir Robert Peel's Act, or of an Order in Council having issued, by a stretch of prerogative, to suspend cash payments.

The manufacturing of these notes by the defendants Messrs. Day for the defendant M. Kossuth, to the enormous amount of one hundred millions of florins, is not disputed. They are (as the bill describes them) in the Hungarian language, they have on their borders in German and also in the Sclavonian and other languages the amount which they purport to represent, and bear upon them an impression of the royal arms of Hungary. The following is a literal translation of one of them :

“One florin.

“This monetary note will be received in every Hungarian State and public pay office as

“One florin in silver.

“Three zwanzigers being one florin, and its whole nominal value is guaranteed by the State.

“In the name of the nation.

“KOSSUTH, LOUIS.”

The note is thus declared to be of the value of one florin in silver, and there is an assurance that it will be received for this amount in every Hungarian State and public pay office, and that its whole nominal value is guaranteed by the State. Finally, it is signed by Louis Kossuth, the defendant, “in the name of the nation,”—he thus declaring that he has the authority of the nation so to sign it, and to give the guarantee.

A remarkable circumstance respecting the note is, that although perfected and ready for issue and circulation, it bears no date, and there is no sign or intimation of an intention to inscribe any date upon it.

Let us now take M. Kossuth’s own statement in his affidavit of the use he means to make of these notes. After asserting “that the plaintiff in this suit is not and never has been King of Hungary, either *de jure* or *de facto*,” he declares “that he himself never has attempted nor had intention to attempt to introduce the said notes, falsely in the said bill called spurious notes, into Hungary so long as the present condition of forcible dominion exists there: what the plaintiff calls revolution, but which will in fact be the restoration of the laws and rights of Hungary, must itself have happened in Hungary before the notes in the said bill named can acquire the value of which the plaintiff expresses so much fear through that circulation in the kingdom of Hungary.”

This answer to the charge of an intention to use the notes with a view to injure and depreciate the present currency of Hungary only amounts to a declaration that M. Kossuth will not attempt to introduce them into Hungary till an opportunity occurs of being able to do so with effect. The “revolution” or “restoration” must be complete “before they have acquired their full value.” But M. Kossuth, whom I consider as a man of honor as well as a man of extraordinary talents and accomplishments, does not deny that as soon as the opportunity offered, he would pour these notes into any part of Hungary where they could be introduced. As soon as they were introduced the existing currency would cease to circulate and would become of

no value. He may well consider this attempt laudable, if he be actuated by a desire to re-establish the ancient constitution of Hungary, not to gratify any object of personal ambition or vengeance; but I must say that in an English court of justice, the manufacturing in England of such notes for such a purpose by him and his associates, I think cannot be defended. M. Kossuth, now an exile in this country, and having *de facto* no authority in Hungary, while a sovereign *de facto*, Francis Joseph, reigns there, the ally of Queen Victoria, a sovereign to whom, while residing in England, M. Kossuth owes temporary allegiance, takes upon himself to affirm that this monetary note will be received in every Hungarian State and public pay office; that its whole nominal value is guaranteed by the State, and that he, Louis Kossuth, has authority to sign it in the name of the Hungarian nation. Can it reasonably be doubted that this was meant to be a rival to the present currency in Hungary, wherever it could be brought into competition with it, and that as the new currency gained credit the old would cease to be of any commercial value? Thus, if the acts meditated by the defendants and forbidden by this injunction were actually done, a pecuniary loss would be sustained by the plaintiff and by all his subjects, holders of the existing currency. It seems to me idle to say that many tons of these notes would be kept in warehouses without bulk being broken, till the wished-for revolution or restoration had become an accomplished fact, and, the existing currency having vanished, room would be made for the introduction of the new currency without prejudice to sovereign or subject. The depreciation or destruction of the existing currency in Hungary, I believe, upon the evidence, to have been an object aimed at by M. Kossuth and those associated with him. The defendants, the Messrs. Day, are allowed to be very respectable tradesmen, but they do not deny the allegation in the 8th paragraph of the bill, that, "before they prepared the plates for the said documents, they were aware of the purpose for which the said Louis Kossuth intended to use the same, and that he was not authorized by the plaintiff to prepare or issue the same, and that the said documents were in violation of the rights of the plaintiff as King of Hungary."

I will now consider the objections to the decree appealed against, which appear to me to be chiefly relied upon by the appellant's counsel in the very learned and very able arguments which we have had the advantage of hearing from them.

In the first place, they deny the right of the plaintiff as a sovereign prince to maintain this suit, and if the suit were instituted merely to support his political power and prerogatives, or for any alleged wrong sanctioned by the government of England, I should acquiesce

in that position. But the King of Spain *v.* Hullett, The King of the Two Sicilies *v.* Willcox, and various other authorities show that by the law of England a foreign sovereign may sue in our courts for a wrong done to him by an English subject unauthorized by the English government in respect of property belonging to the foreign sovereign, either in his individual or in his corporate capacity.

Then comes the great question, whether this is a subject over which the Court of Chancery has jurisdiction by injunction?

Notwithstanding my sincere respect for the authority of that great American jurist, Justice STORY, I cannot concur with him in his recommendation of a mysterious obscurity to be preserved by Courts of Equity respecting special injunctions, and the caution which should make them "decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions should be granted or withheld." I think that all branches of the law should, if possible, be made clear and simple, and should be defined as accurately as possible. I have no hesitation in saying that Lord MACCLESFIELD was wrong when he laid down in *Burnett v. Chetwood*, that "the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality." So I have no hesitation in saying that Lord ELLENBOROUGH was wrong when he laid down in *Dubost v. Beresford*, that "the Lord Chancellor would grant an injunction against the exhibition of a libellous picture."

For this language I have the high authority of Lord ELDON, who in *Gee v. Pritchard*,¹ upon the question of granting an injunction against the publication of a libel, said, "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes"; adding, what is most pertinent to the present case, "the question will be whether the bill has stated facts of which the court can take notice as a case of civil property which it is bound to protect."

Again, the same great Judge in the same case of *Gee v. Pritchard*, with reference to the question, whether there can be property in a letter written to a friend, after admitting that, if the question had then arisen for the first time, he should have found it difficult to satisfy his mind that there was a property in the letter, goes on to say, "but it is my duty to submit my judgment to the authority of those who had gone before me. The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the

doctrines of this court are to be changed with every succeeding Judge. Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot." The recommendation of mystery and obscurity in treating of judicial jurisdiction is only fit for the Star Chamber, which was called "a Court of Criminal Equity." I consider that this court has jurisdiction by injunction to protect property from an act threatened, which if completed would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted.

Although an action arising purely *ex delicto* for an injury to property may not have been brought by a foreign sovereign against an English subject in an English court, on principle I cannot doubt that such action would be maintainable. If the bank of Austria were actually damaged by the unlawful importation from England into Hungary of spurious notes intended to discredit the notes of the bank of Austria, I apprehend that the bank of Austria might maintain an action in England against the wrong-doers. The case of the Bank of England *v.* Anderson may be considered an authority that the bank of Austria might maintain an action and be entitled to an injunction under such circumstances. If the bank of Austria might, why may not the King of Hungary, on proof that by the same wrong a pecuniary damage has been sustained by him?

The case of Sir James Clark *v.* Freeman is cited as an authority against an injunction for a wrong which produces pecuniary damage. There Lord LANGDALE refused an application by a very distinguished physician for an injunction against the wrongful publication of advertisements falsely imputing to him that he sold and recommended quack medicines, in a manner tending to injure his practice and profits. But the injunction was refused only on the ground that the plaintiff did not make out that any pecuniary loss would accrue to him from the publication ; and Lord LANGDALE said, "The granting the injunction in this case would imply that the court has jurisdiction to stay the publication of a libel." For the same reason, in Martin *v.* Wright, an injunction was refused to Mr. Martin, the celebrated artist who painted Belshazzar's Feast, against the exhibition of a copy of it on a greatly enlarged scale, with dioramic effect, and advertised as "Mr. Martin's grand picture of Belshazzar's Feast." The Vice-Chancellor SHADWELL there observed, "The copy represented as Martin's picture must be either better or worse: if it is better, Martin has the

benefit of it ; if worse, then the misrepresentation is only a sort of libel, and the court will not prevent the publication of a libel " : adding, " if Martin had exhibited his picture as a diorama, then he might have been entitled to an injunction." Pecuniary damage, therefore, in such cases is always made the criterion.

Great reliance was placed by the appellant's counsel on the decision of the House of Lords in *Jeffery v. Boosey*, reversing an unanimous decision of the Court of Exchequer Chamber, in which I had concurred. That high tribunal must of course be considered as having decided rightly, but the *ratio decidendi* was merely that an absolute assignment executed abroad of all an author's copyright in a musical composition gave no title to the assignee beyond the territory of the State in which the assignment was executed, and this is no authority for saying that the assignee could not have maintained an action in England for an injury to the copyright within the limits of that territory.

A more specious objection was rested on the class of cases in which it has been held that we take no notice of the " revenue laws " of foreign countries, so that an injunction would certainly be refused to a foreign sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, " revenue laws " have always been made the exception ; and this may be an example of an exception proving the rule. The prohibition by the government of China of the importation of opium, on the alleged ground of public morals, was likewise mentioned ; but the English government refused to interfere with this trade, considering that the Chinese prohibition was rather with a view to revenue, or for the protection of the native culture of the poppy.

Last of all, we were told that as his holiness the Pope, being a temporal sovereign, has an *index expurgatorius*, including a translation of the Holy Scriptures ; if he were to make it penal to import into Civita Vecchia any of the books in this index (which would clearly be within the scope of his lawful authority), according to the doctrine contended for by the Emperor of Austria, his holiness might apply for an injunction against the exportation from this country of a cargo destined for his dominions consisting of volumes which we revere as most sacred. But as to foreign laws which we are to respect, there has ever been an exception of foreign laws in conflict with our own laws on subjects of religion and morality. In this last case it could hardly be alleged that any injury to property, or any pecuniary loss, could come in question.

Before concluding, I ought to mention that my opinion in favor of the decree does not by any means depend upon the supposed analogy between this case and the prosecution of Peltier for libelling the Emperor Napoleon, or the prosecution of Lord George Gordon for libelling Marie Antoinette. Nor do I think that *Farina v. Silverlock*, or any of the trade-mark cases, can be rendered available; for here, instead of there being any attempt at simulation, the object is clearly disclosed to make a contrast between Kossuth's notes and those of the Emperor of Austria. For the same reason, the Acts of Parliament against forging the paper securities of foreign governments do not assist us.

I must likewise observe, with great deference to some remarks which were made during the argument, that I do not think that any importance is to be attached to the fact that M. Kossuth had actually been finance minister of Hungary at a prior period; for not only is the plaintiff's bill entirely silent on this subject, whereas it ought to have charged the fact, if reliance was to be placed on his continuing to act in that capacity when his authority to do so had expired, but there seems to me to be no ground whatever for imputing fraud to him on this score; and no one in Hungary can be supposed to give credit to the notes on the supposition that they were issued with the authority of the Emperor of Austria. Therefore the case of *Routh v. Webster*,¹ in which an injunction was granted against advertisements falsely representing the plaintiff to be director of a joint-stock company, does not seem to me to apply.

But I repeat that I place much reliance on the fact that the defendant Kossuth by these notes asserts that they are guaranteed by the State, and that he had authority to sign them in the name of the Hungarian nation.

It is very satisfactory to me to think that if this decree is affirmed there is no danger of this country losing the credit which it has long enjoyed of being an asylum for those who, from persecution or revolution, have been driven for a time from their native land. They enjoy this asylum on the condition that while resident in England they enter into no conspiracies or plots against existing governments in foreign States which would be an infraction of our municipal law by native-born subjects. Fitting out a warlike expedition in England to bring about a revolution in the dominions of a sovereign in alliance with Queen Victoria would certainly amount to a misdemeanor, be the confederates native-born subjects or aliens, and the manufacture of twenty tons of promissory notes for the same purpose may amount

¹ *To Beav.* 561.

to the same offence. Therefore I can consider M. Kossuth no more an object of pity, if by an injunction he receives a check in this enterprise, than the Emperor Louis Napoleon would have been, if by a criminal prosecution he had been stopped in his enterprise when he was about to sail from the Thames for Boulogne, with a view to dethrone Louis Philippe.

Our sympathy has been powerfully appealed to in favor of the Messrs. Day, if their plates for printing Hungarian notes should be defaced and all the Hungarian notes they have manufactured should be damasked, and, instead of circulating at Presburg, Pesth, and Buda, should be consigned to the use of the grocer and the trunk-maker in London, the manufacturers having a very dubious remedy by action against M. Kossuth for their work, labor, and materials. But they must have been aware that there was some considerable risk in the gigantic speculation in which they embarked ; and as they no doubt would have derived much profit as well as fame, if Hungary had been revolutionized by their means, they must console themselves with the reflection that they have failed in a great enterprise, and that their fate holds out a lesson to other tradesmen to be contented with the gains and reputation to be earned in the ordinary occupations of their calling, however sober and commonplace these may be.

I rather think that the decree ought to be varied with respect to prohibiting M. Kossuth from the use of the royal arms of Hungary ; for it would appear that they may be innocently used by all Hungarians, and, I presume, by all mankind.

With this variation, I am of opinion that the decree appealed against ought to be affirmed, and that the appeal must be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. In this case the material facts are substantially undisputed. There has been some controversy as to immaterial facts, which may be passed over. The question of law mainly, if not solely, raised has been whether the actual reigning sovereign of a foreign State in amity with Great Britain can sue in this court for the purpose of preventing the exportation from England of notes for money, which, professing to be issued by the authority of that foreign nation, and to be in effect its paper money, but having had no sanction from its actual government, have been manufactured here with the intention of exporting them from hence at some future possible time, or on the happening of some contingent event, for circulation and use in that country : a question which, generally put, must be capable, I suppose, of receiving, consistently with the nature of this jurisdiction and the principles that regulate the intercourse and relations between civilized nations on friendly terms together, only an affirmative answer. There may, however, be special circumstances

excluding or displacing the right of suit *prima facie* existing. Are there such before us?

The plaintiff is, and during all the time material for us now to consider has been, the actually reigning sovereign of the kingdom of Hungary, and recognized by the sovereign of this country and her government as the sovereign of the kingdom of Hungary. The plaintiff, as the sovereign of Hungary, is, and during the whole time has been, at peace with the British Queen and government. The two sovereigns accordingly, the two governments, the two nations, are, and during the whole time have been, on friendly terms together, and we are, I think, clearly bound to take the plaintiff and his government to have been all along and to be the lawful sovereign and lawful government of the kingdom of Hungary. The acts done and intended by the defendants, which appear upon the bill and affidavits in the cause, and to which I am about to advert, have not been wholly or in part authorized, sanctioned, or approved by the plaintiff or his government. The plaintiff and his government object strongly to every portion of them. The defendants, before and when this suit was instituted, were resident in England, and therefore within the jurisdiction of the Queen's Superior Courts here, and in every sense important for any present purpose, if not in every sense whatever, her subjects. They have appeared in the suit and defended it. Their proceedings, of which complaint is made, have been thus: They have been preparing in this country for public issue in Hungary, and for practical use there, a great number of notes for various amounts of money; namely, florins or guldens, each note being, chiefly at least, in the Hungarian language. A sufficient sample is given by translation in the 5th paragraph of the bill, and the Lord Chancellor has stated it. The notes are undated. They purport to be signed by a Hungarian gentleman, one of the defendants, "in the name of the nation," that is to say, "in the name of the Hungarian nation," and each note distinctly asserts that "its whole nominal value is guaranteed by the State," the word "State" there plainly meaning "the Hungarian State." We must, I repeat, hold the plaintiff to be the representative here, for every purpose now material, of the Hungarian realm and State; that is to say, of the State which the notes describe as guaranteeing their whole nominal value. And I conceive that, for every purpose at present important, his case stands on the same basis as if the notes had described their whole nominal value as guaranteed by the head of the Hungarian realm or Hungarian State, or by the executive government of the Hungarian realm or Hungarian State. We are bound to regard the plaintiff as being, and having been during all the time important now to be regarded, the head of that realm,

the head of that State, the head of its executive government. That in the condition of the relations between the governments of Hungary and of Great Britain, as those relations exist and during all the time material for us to regard have existed, the preparation here without and against the plaintiff's consent of such documents as these, with the intention of issuing and using them in Hungary without and against his consent, was and is by the law of England, was and is by the law of nations, wrongful, is, I think, manifest, though whether by the law of England or the law of nations criminal as well as wrongful I think a question not for any present purpose material. When I use the term "wrongful," I mean "civilly unlawful," as regards rights of property, that is to say, the public revenues, the fiscal resources, the pecuniary means of the realm of Hungary, which rights the plaintiff is entitled to represent here. He is, I apprehend, entitled therefore to the protection of this court, according to its ordinary course in analogous cases, from the infliction of such a wrong. That he is resident abroad, domiciled abroad, and a foreign potentate, cannot make any difference adverse to him; for he is an alien friend, a potentate at peace and in amity with this kingdom. It has been argued that we ought to delay or abstain from acting, because the documents in question were and are intended to be, and can practically be, used only in Hungary, nor at all unless the present system of government in that country shall be subverted or importantly changed. This seems to me not to improve the defendants' case. That a superior court here is not, at the instance whether of an Englishman or of an alien friend, to interfere to prevent a civil wrong intended by persons resident here, merely because, though their preparations for the perpetration of the wrong are practically proceeding here, it is, when they shall be completed, to be carried into execution elsewhere in a friendly kingdom, seems to me a proposition plainly untenable, whether we regard principle or authority.

What the defendants have been doing is with a view to publication and public issue at some possible time, is with a view to the use of the documents at some possible time; and although the present state of affairs in Hungary may possibly continue unchanged for an incalculable length of duration, the defendants' proceedings cannot the more be viewed, I think, as just or harmless; and it would, in my opinion, be a discredit to our institutions and a breach of English and of international law to refuse relief to the plaintiff. We must take it to be the opinion of one at least of the defendants, and certainly it is mine, that, in the event of an attempt at subverting the present government of Hungary, a store of such documents in readiness would be of assistance to that endeavor—a remark not in a political sense or

with a political bearing material,—but possibly not unimportant with reference strictly to the proper ground on which our jurisdiction for the present purpose rests.

The notes do not purport to point merely to a future or contingent or possible liability of the “State.” Their form imports present and immediate liability. They are, I repeat, undated; nor perhaps is it altogether immaterial to notice that M. Kossuth states himself to have been at a former period, under the Emperor Ferdinand when reigning King of Hungary, the finance minister of that country. The defendants, who have been manufacturing instruments not then and not at present capable of being lawfully used, nor certain to be at any time capable of lawful use, but which were then and are now capable of being unlawfully used, claim credit for intending to use them only when, if ever, they shall be able lawfully to use them. That credit I consider them not warranted in claiming from a court of justice, which will not trust to promises of peace and prudence made by the framers and bearers of unlawful weapons. The Vice-Chancellor held the plaintiff entitled in terms, or substantially, to the relief prayed by the bill, and I also think him so entitled, at least in the main. The language of the prayer and decree is, probably, with respect to the armorial bearings of Hungary, too extensive, as the Lord Chancellor has stated; and so, indeed, it seems to have been agreed at the bar.

That small matter will be provided for; and the cancellation or destruction should be, I suppose, as directed by the Vice-Chancellor. Costs, down to the hearing before that learned Judge, were waived, I believe, in his court by the plaintiff's counsel. That waiver had probably better appear on the record. The defendants ought, I think, to be ordered to pay the costs of the appeals, unless the plaintiff shall also waive them.

THE LORD JUSTICE TURNER. I have but little to add in this case. This bill, as I read it, puts the plaintiff's case upon three grounds: 1st. Violation of the rights and prerogative of the plaintiff as King of Hungary, by the promotion of revolution and disorder, and otherwise. 2d. Injury to the State of Hungary, by the introduction of a spurious circulation into that kingdom. And 3d. Injury to the subjects of the plaintiff, by the same cause. The charges of the bill in these respects are that the defendant Kossuth intends to use the notes in question in violation of the rights and prerogative of the plaintiff as King of Hungary, and, amongst other purposes, for the promotion of revolution and disorder there, and that the introduction of the notes into Hungary will create a spurious circulation in that country, and by that and other means cause great detriment to the State and to the subjects of the plaintiff.

That this court has no jurisdiction to interfere upon the ground that the notes in question are intended to be used for the purpose of promoting revolution and disorder in the kingdom of Hungary was freely conceded at the bar by the plaintiff's counsel, and can admit of no doubt. This view of the case, therefore, may be laid out of consideration. It was urged, however, on the part of the defendants, that the prevention of revolutionary designs was the main if not the sole object of this bill, and that the court ought, upon that ground, to have refused its interference, but we can know nothing of what is passing or may be intended in Hungary, except what is judicially before us; and if the bill states other grounds affording title to relief, we are bound, as I apprehend, to pay attention to those grounds.

This brings us to the question, whether the infringement of the prerogative rights of a foreign sovereign constitutes a ground of suit in this court. The case was very much argued upon this point. It was urged for the plaintiff that the right of coining money, the *jus cuendae monetæ*, was universally acknowledged to be a prerogative of sovereigns, vested in them for the benefit of their subjects; that this prerogative right extended no less to the creation of paper money than to the stamping of coin; that it was acknowledged by all nations and recognized by international law; and that, international law being part of the law of England, this court would interfere in favor of the rights recognized by and founded upon it. That the right of coining money is the prerogative of a sovereign is laid down by all the writers on international law, and I see no reason to doubt that the prerogative right reaches to the issue of paper money. Burlamaqui,¹ indeed, mentions and treats of it as so extending. To this extent, therefore, I agree with the argument on the part of the plaintiff, but the argument failed to satisfy my mind that this court can or ought to interfere in aid of the prerogatives of a foreign sovereign. The prerogative rights of sovereigns seem to me, as at present advised, to stand very much upon the same footing as acts of State and matters of that description, with which the municipal courts of this country do not and cannot interfere. Such acts and matters are recognized by international law no less than the prerogative rights of sovereigns; but the municipal courts of this country have disclaimed all right to interfere with respect to them. If the subject of one State infringes the prerogative of the sovereign of another State, the remedy, as I apprehend, lies in an appeal by the offended sovereign to the sovereign of the State to which the offender belongs, and if redress be unjustly refused, the refusal may, as I apprehend, even be made the ground of

¹ Vol. 3, p. 241.

war. This, I think, may be gathered from Vattel, and it seems to me important to be adhered to; for the prerogative of peace and war belongs to the sovereign of every State, and it can hardly be denied that the interference of the municipal courts in such matters may tend very much to embarrass if not to fetter the free exercise of these latter prerogatives. The same reasoning which applies to the prerogative rights of sovereigns seems to me to apply also to the political rights of nations; and so far, therefore, as this bill is founded upon the prerogative rights of the plaintiff, or upon the political rights of his subjects, my present opinion, speaking with all respect of what fell from the Vice-Chancellor in the course of his judgment, is against the decree which he has made.

The conclusion to which I have come in this case does not, however, depend upon these points; and I do not think it necessary, therefore, to enter more fully into them, or into the arguments bearing upon them; nor do I wish to be understood as giving any final opinion upon them. This case, as it seems to me, may and ought to be decided upon the third ground on which the case is rested by the bill,—the injury to the subjects of the plaintiff by the introduction of a spurious circulation. I take it to be now well settled, although upon looking into the authorities I have been surprised to find that the point was doubted even in the time of Lord LOUGHBOROUGH,¹ that a foreign sovereign may sue in the courts of this country, and that he may sue in this court on the behalf of his subjects; and this bill, if it does not require, certainly admits the construction, that it is filed by the plaintiff in his representative character on behalf of the subjects of his kingdom, for it distinctly alleges a case of injury to them. We must consider, then, what is the nature of this injury. I think it is an injury not to the political but to the private rights of the plaintiff's subjects. What is proposed to be done is to introduce into the kingdom of Hungary an enormous number of notes which, on the face of them, purport that they will be received in the public offices of the State and that they are guaranteed by the State, and which purport also to be signed in the name of the nation by the defendant, Louis Kossuth. That the effect of this introduction will be to disturb the circulation of the kingdom cannot, in my opinion, be doubted; and what will be the effect of that disturbance? Surely to endanger, to prejudice, and to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of Austrian banknotes, and indirectly, if not directly, all the holders of property in the State. The same great authority to which I have referred has very clearly pointed out these consequences.² But it is said that the acts

¹ 3 Ves. 431.

² Vattel, Book I, c. 10.

proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this court in a case of this nature rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this court. I do not agree to the proposition, that there is no remedy in this court if there be no remedy at law, and still less do I agree to the proposition that this court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this court, Lord REDESDALE, in his Treatise on Pleading, in enumerating the cases to which the jurisdiction of the court extends, mentions cases of this class: "Where the principles of law by which the ordinary courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent." It is plain, therefore, that, in the opinion of Lord REDESDALE, who was pre-eminently distinguished for his knowledge of the principles of this court, the jurisdiction of the court is not limited to cases in which there is a right at law. There is, indeed, a familiar instance in which the jurisdiction is not so limited,—the cases of waste. In some cases of waste there was no right and no remedy at law, but this court did not on that ground refuse its interference. I do not refer to the case of equitable waste, which, however, is another instance, but to the cases in which there was an intervening legal estate. To say that the jurisdiction of this court is limited only by the principles of universal justice would no doubt be going too far, and I must not be understood so to construe what Lord REDESDALE has said. I take the passage to refer to cases in which there is what the law in principle acknowledges to be a wrong, but as to which it gives no remedy, as in the case of waste to which I have referred. The case before us may, I think, well be tried by this rule. If the property of an individual is affected by an undue and unauthorized use of his name, the law would no doubt give a remedy. I am not satisfied that the law would not give the same remedy in the case of the undue and unauthorized use of the name of a nation or State; but whether it would do so or not, and if not, whether it would be prevented from doing so by the absence of positive law or by mere formal impediments as to the right to sue, I think the authority to which I have referred, and the instance which I have mentioned of the application of it, warrant me in saying that the case falls within

the jurisdiction of this court. It was said, on the part of the defendants, that the court has only interfered in cases of this nature where there was a right at law, or where there was trust or confidence ; but if the jurisdiction exists, the extent of it cannot be limited by the instances in which it has been applied. It was also attempted to be argued on the part of the defendants, that, assuming the existence of the jurisdiction, there was no sufficient case for the exercise of it. But upon this point I have felt no doubt. The jurisdiction of this court is preventive as well as remedial, and the affidavit of the defendant Kossuth himself quite satisfies my mind that there is a proper case for the exercise of it. Subject, therefore, to the qualification to which the Lord Chancellor has adverted, I think that this decree must stand.

V
BRANDRETH *v.* LANCE.

IN THE COURT OF CHANCERY OF NEW YORK, JULY 16, 1839.

[Reported in 8 Paige 24.]

THIS case came before the court upon the demurrers of Lance and Hodges, two of the defendants, to the complainant's bill. The complainant was the proprietor and vender of a nostrum known by the name of "Brandreth's Vegetable Universal Pills." And, as the bill alleged, by advertising this medicine extensively in the public papers in the State of New York and elsewhere, and thus giving publicity to it and its general efficacy in the cure of diseases, the complainant had derived and was still deriving therefrom a comfortable support for himself and his family. The complainant also alleged that for the purpose of vending his pills he had been in the habit of keeping various offices, and of employing many agents and clerks ; that among others he had employed the defendant, Lance, but had been obliged to discharge him for improper conduct ; that in consequence of being thus discharged, Lance became very much enraged and vowed revenge, and threatened to destroy the complainant ; and that he thereupon opened a rival establishment for the purpose of vending medicine or pills in the city of New York. The complainant further charged in his bill, that a short time previous to the filing thereof he had been spoken to by the defendant Trust, and informed that Lance had applied to him to write the complainant's life, and that he was inclined to do so, but would relinquish the undertaking for a bonus of \$50 ; that the complainant spurned the offer, and bade Trust not to presume

to repeat such a proposition, and that shortly thereafter, and previous to the filing of the bill, the complainant received a printed sheet, enclosed to him in a letter, containing the title-page and preface and two other pages of a work or pamphlet entitled "The Life, Exploits, Comical Adventures and Amorous Intrigues of Benjamin Brandling, M. D. V. P. L. V. S., a distinguished pill vender, written by himself; interspersed with racy descriptions of scenes of life in London and New York"; which work, by the title-page, purported to be printed at New York, by D. M. Hodges, for the proprietors, and to be had of all the booksellers. The residue of this first sheet of the work, which was set out at length in the bill, contained a ludicrous preface in which the complainant was represented as avowing his object in raking up and publishing all the vices and follies of his youth, to be for the double purpose of amusing himself and as a warning to others to avoid them. And the table of contents represented him as being *filius nullius*, or rather as being *filius populi*, the child of many fathers, and as having passed through the various and successive grades of sailor, confectioner, painter, brass founder, peddler, jeweler, bagman to a pill vender, money broker, author, poet, and dramatist; until he had risen to the rank of a wholesale manufacturer of that rare medicine, upon which the smiles of fortune had been so freely bestowed. The complainant further charged that the before-mentioned book, or pamphlet, was then actually printing by the defendant, Hodges, for Lance, and under the direction and superintendence of the defendant, Trust, who was the author of the work; that the same, so far as appeared by the printed sheet set out in the bill, was a false, malicious, and highly injurious libel upon the complainant, and was intended to libel him and to bring him into public disgrace and contempt; although in the title-page the person whose life it purported to be was called Benjamin Brandling instead of Brandreth, his real name; and that the defendants were printing the work, and causing it to be printed for the purpose and with the intent of publishing the same and causing it to be widely distributed throughout the country. He therefore prayed for a perpetual injunction restraining the defendants from printing or publishing such book or pamphlet, or the contents thereof, or any part thereof; and that they might be decreed to deliver up the manuscript of the work, and all and every copy thereof, or of any part of the same printed by them, or either of them, to be cancelled and destroyed; and for such further or other relief as he might be entitled to in the premises. To this bill the defendants, Lance and Hodges, put in separate demurrs, both as to the discovery and relief sought.

James Smith for the complainant.

T. W. Clerke for the defendant Hodges.

S. Sherwood for the defendant Lance.

The CHANCELLOR.¹ It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government.² This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages.³ And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation. In the case to which I allude, the notorious Scroggs, chief justice of the court of king's bench, and his associates, decided that they might be safely entrusted with the power of prohibiting and suppressing such publications as they might deem to be libellous. They accordingly made an order of the court prohibiting any person from printing or publishing a periodical, entitled "The Weekly Packet of Advice from Rome, or the History of Popery." The House of Commons, however, considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment.⁴ And I believe no judge or chancellor from that time to the present has attempted to follow that precedent. There is, indeed, in the reported case of *Du Bost v. Beresford*,⁵ which was an action of trespass against the defendant for destroying a libellous picture, a most extraordinary declaration of Lord Ellenborough, that the Lord Chancellor, upon an application to him, would have granted an injunction against the exhibition of the libellous painting. It is said, however, in a note to Horne's case, in the state trials, that this declaration of Lord Ellenborough, in relation to the power of the Lord Chancellor to restrain the publication of a libel by injunction, excited great astonishment

¹ Reuben H. Walworth.—ED.

² 2 R. S. 737, § 1, and Revisers' note.

³ Hudson's Star Chamber, 2 Collect. Jurid. 224.

⁴ 8 Howell's State Trials, 198.

⁵ 2 Camp. Rep. 511.

in the minds of all the practitioners in the courts of equity.¹ It must unquestionably be considered as a hasty declaration, made without reflection during the progress of a trial at *nisi prius*; and as such it is not entitled to any weight whatever.

The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property. Upon this principle alone Lord Eldon placed his decision, in the case of *Gee v. Pritchard*,² continuing the injunction which restrained the defendant from publishing copies of certain letters written to him by the complainant. But it may, perhaps, be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when in fact the object of the complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only. His decision in that case has, however, as I see, received the unqualified approbation of the learned American commentator on equity jurisprudence.³

In this case the complainant does not claim the exercise of the extraordinary jurisdiction of this court on the ground of any violation of the rights of literary property, or because a work is improperly attributed to him which will be likely to injure his reputation as an author, or even as a manufacturer of pills. For although his counsel insist that it must necessarily have the effect to injure the sale of his pills, he has not alleged in his bill that he even believes it will have any such effect. And in the absence of such an allegation, I am, as a matter of opinion, inclined to the belief that with that class of persons who would be likely to buy and take his "universal pills," as a general remedy for any and every disease to which the human body is subject, the supposition that he was the author of the publication in question, and was also the extraordinary personage which this table of the contents of the work indicates, would be very likely to induce them to purchase and use his medicine the more readily.

As the publication of the work, therefore, which is sought to be restrained, cannot be considered as an invasion of the rights either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, this court has no jurisdiction or authority to interfere for his protection. And if the defendants persist in their intention of giving this libellous production to the public, he must seek his remedy by a civil suit in a court

¹ 20 Howell's St. Tr. 799.

² 2 Swanst. Rep. 403.

³ See 2 Story's Eq. 222, § 948.

of law ; or by instituting a criminal prosecution, to the end that the libellers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise.

The demurrs must be allowed, and the complainant's bill dismissed, as to these defendants, with costs.

BOSTON DIATITE CO. v. FLORENCE MANUFACTURING
CO. AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEM-
BER, 1873.

[*Reported in 114 Mass. 69.*]

BILL IN EQUITY against the Florence Manufacturing Company, Isaac S. Parsons, George A. Burr, and George A. Scott, alleging that the plaintiff corporation was and for three years had been engaged in the manufacture of sundry articles, among which were toilet mirrors, made from a composition, invented and patented by one Merrick, which was capable of being moulded by heat and pressure into various shapes, and that they had applied to this material the trade-mark name "Diatite," by which it was generally known; that the defendant corporation was engaged in the manufacture of toilet mirrors from another material capable of being moulded and pressed, upon which there were no letters patent; that the defendant Parsons was the president, the defendant Burr the treasurer, and the defendant Scott the agent of the defendant corporation; that Parsons, Burr, and Scott, acting as such officers and in the name of the corporation, falsely, fraudulently, and maliciously, and for the purpose of injuring the plaintiff and diverting its trade, represented to the plaintiff's customers that the articles manufactured by the plaintiff under its letters patent were manufactured in infringement of letters patent owned by the defendant corporation, and that the defendant corporation was prosecuting a suit against the plaintiff corporation for such infringement. The bill then set forth specific instances in which persons, in the bill named, who intended to make purchases of the plaintiff, had been deterred therefrom by oral and written representations, of the purport above set forth, made to them by the defendants, and had been induced to purchase of the defendant corporation.

The bill prayed that the defendants might be enjoined from making such representations, and that the defendant corporation might

be decreed to account for the profits of its sales made by reason of such false representations.

The defendants demurred, because the plaintiff had not stated a case which entitled it to the relief prayed for.

D. W. Bond for the defendants.

T. W. Clarke for the plaintiff.

GRAY, C. J. The jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract.¹ The opinions of Vice-Chancellor Malins in *Springhead Spinning Co. v. Riley*,² in *Dixon v. Holden*,³ and in *Rollins v. Hinks*,⁴ appear to us to be so inconsistent with these authorities and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark or letters, and of the defendant's unlawful use thereof.⁵

The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name; but only that the defendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor; and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretence that they infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law.⁶

Demurrer sustained and bill dismissed.

¹ *Huggonson's case*, 2 Atk. 469, 488; *Gee v. Pritchard*, 2 Swanst. 402, 413; *Seeley v. Fisher*, 11 Sim. 581, 583; *Fleming v. Newton*, 1 H. L. Cas. 363, 371, 376; *Emperor of Austria v. Day*, 3 De G., F. & J. 217, 238-241; *Mulkern v. Ward*, L. R. 13 Eq. 619.

² L. R. 6 Eq. 551.

³ L. R. 7 Eq. 488.

⁴ L. R. 13 Eq. 355.

⁵ *Routh v. Webster*, 10 Beav. 561; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J. & S. 137, and 11 H. L. Cas. 523; *Maxwell v. Hogg*, L. R. 2 Ch. 307, 310, 313; *Gee v. Pritchard*, 2 Swanst. 402.

⁶ *Barley v. Walford*, 9 Q. B. 197; *Wren v. Weild*, L. R. 4 Q. B. 730.

PRUDENTIAL ASSURANCE COMPANY *v.* KNOTT.

IN THE COURT OF APPEAL, JANUARY 20, 1875.

[*Reported in Law Reports, 10 Chancery Appeals, 142.*]

THE plaintiffs in this case were a life assurance company carrying on business in London, and having an income of above £450,000 a year. The defendant had lately published a pamphlet on life assurance companies, in which he gave statistics and calculations as to the principal assurance offices, their incomes, rates of premium, expenses of collection, and ratio of assets to liabilities. He commented on the state of several of the companies, amongst which were the plaintiffs. The plaintiffs thereupon filed a bill against the defendant, charging that the effect of certain specified portions of the pamphlet and of the erroneous statements in it as to the rates of premium charged by the company was to represent the company as being managed with reckless extravagance, and as being in a state of insolvency and unable to fulfil its engagements ; that that representation was utterly untrue, and that the company's affairs were managed without extravagance ; and that the company had been for many years past, and was still, in an exceedingly prosperous and thriving condition, abundantly solvent, and earning large profits. The bill further charged that the continued publication of the pamphlet containing the passages and statements in the bill complained of would be very injurious to the company's credit and reputation, and could not fail greatly to damage the company's business, and to diminish its profits derived from it. And the bill accordingly prayed that the publication of the pamphlet might be restrained, and for consequent relief.

The Vice-Chancellor Hall refused to grant an injunction, and the plaintiffs now, by way of appeal, moved for an injunction.

Mr. Higgins, Q.C., and Mr. Phear (Mr. Dickinson, Q.C., with them), in support of the appeal.

Mr. Morgan, Q.C., and Mr. Ince, for the defendant, were not called upon.

LORD CAIRNS, L. C. I am of opinion that there is no ground whatever for the interference of the court in this case. The court is asked by an insurance company to grant an injunction to restrain the continued publication of a pamphlet which comments upon the statistical returns of various insurance companies with regard to the comparative expenses of their establishments as compared with their liabilities ; and it is said that this pamphlet in those comments draws

unfavorable conclusions with regard to the company which are plaintiffs here, and that the expressions in the pamphlet will be injurious to this company in their trade and business. Now, the comments and expressions in this pamphlet either do amount to a libel upon the company, or do not. If they do not amount to a libel, and are therefore innocuous and justifiable in the eye of a court of common law, I am at a loss to understand upon what principle the Court of Chancery could possibly interfere as a *censor morum* or critic to restrain the publication of statements or expressions which would be held justifiable in a court of common law. If, on the other hand, these comments do amount to a libel, then, as I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain them, will not be restrained the less because they happen also to be libellous.

But apart from the suggestion that the publication here is a libel, I do not observe in the bill any statement or foundation for the jurisdiction of the court to restrain. I repeat, if the observations are not libellous, they are lawful, and ought not to be restrained ; if they are libellous, it is only because they are libellous that the Court of Chancery is asked to restrain them.

It is attempted to give a color to the application by saying that these are libellous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the good will of the company, is property ; that the company in its trade will be injured, and that, therefore, the interference of the court is asked for the protection of property. But with regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations, which have an effect upon their character and upon their trade or business, or their character as connected with trade or business ; but no case can be produced in which, in those circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction. There are the observations of Lord Eldon in *Gee v. Pritchard*,¹ the observations of Lord Campbell in the case of the Emperor of Austria *v. Day* ;² there is the dictum of Lord Langdale in the case of *Clark v. Freeman*,³ which stands irrespective of any comments which

¹ 2 Sw. 402, 413.

² 3 D. F. & J. 217.

³ 11 Beav. 112.

may be made upon the decision of that particular case; there is the observation of the late Vice-Chancellor of England in *Martin v. Wright*,¹ and there are the observations of the late Vice-Chancellor Wickens in *Mulkern v. Ward*.² Over and above those, there is the decision of the House of Lords in *Fleming v. Newton*,³ and it is clear to my mind, from reading the opinion of Lord Cottenham, whose was the only opinion pronounced in that case, that the whole of it proceeds on one footing. He considered that the case being Scotch, some nicety of Scotch law might be made to appear in the courts of Scotland which would entitle them to interfere with the publication complained of in that case, but that unless some such feature of Scotch law could be shown, no such interference could, upon the general principles of English law, be permitted.

Now, the only shadow of authority the other way is in the case of *Dixon v. Holden*,⁴ decided by Vice-Chancellor Malins in the year 1869. I say nothing about the decision in that particular case, and I do not mean to say that the decision is not capable of being maintained. It professes to proceed mainly upon a case of *Routh v. Webster*,⁵ because I observe that the Vice-Chancellor says:⁶ "The case of *Routh v. Webster* is an authority going the whole length of what is asked here. In that case a joint stock company was established, having for its only object the carrying passengers by steamboat and omnibus at a cheap rate. The defendants, the provisional directors, had published prospectuses, in which the name of the plaintiff was used, without his authority, as a trustee of the company. They also paid moneys into the bankers of the company to the plaintiff's account, as trustee." That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the plaintiff might have been placed, especially at the time when that case was decided, looking at what was supposed then to be the state of the law as to such undertakings, are obvious; and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name. It was upon the authority of that case that the case of *Dixon v. Holden* was professed to be decided; but the Vice-Chancellor went further, and said this:⁷ "The business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say, if it had only injured his reputation, it is within the

¹ 6 Sim. 297.

² Law Rep. 13 Eq. 619.

³ 1 H. L. C. 363.

⁴ Law Rep. 7 Eq. 488.

⁵ 10 Beav. 561.

⁶ Law Rep. 7 Eq. 493.

⁷ Ibid. 492.

jurisdiction of this court to stop the publication of a libel of this description, which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property. In this case I go on general principle, and I am fortified by authority. General principle is in favor of it, but authority is not wanting." And further on, the Vice-Chancellor says:¹ "In the decision I arrive at, I beg to be understood as laying down, that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." Now, in those opinions the Vice-Chancellor conceived that he was fortified by authority. The authorities cited are, the case of *Fleming v. Newton*,² which appears to me to be an authority exactly to the contrary; the case of *Routh v. Webster*,³ which was an authority for preventing the improper use of a man's name against his will; the case of *Clark v. Freeman*,⁴ where the injunction was refused, and where Lord Langdale said the court would not interfere to prevent a libel; and the only other case mentioned, *Springhead Spinning Company v. Riley*,⁵ decided by the Vice-Chancellor himself, upon which of course the learned judge must be taken to have expressed the same opinion as he expressed in the case of *Dixon v. Holden*.⁶

I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this court, and I cannot accept them as an authority for the present application. I think that this appeal must be refused with costs.

SIR W. M. JAMES, L.J. I am of the same opinion; and I think it is right, this appeal being brought, to express my entire concurrence in the views just stated by the Lord Chancellor. I think that the Vice-Chancellor Malins, in that case of *Dixon v. Holden*, was, by his desire to do what was right, led to exaggerate the jurisdiction of this court in a manner for which there was no authority in any reported case, and no foundation in principle. I think it right to say that I hold without doubt that the statement of the law in that case is not correct.

SIR G. MELLISH, L. J. I also am entirely of the same opinion.

Messrs. Barnard & Co., solicitors for the plaintiffs.

Messrs. Speechly & Co., solicitors for the defendant.

¹ Law Rep. 7 Eq. 494.

² 1 H. L. C. 363.

³ 10 Ibid. 561.

⁴ 11 Beav. 112.

⁵ Law Rep. 6 Eq. 551.

⁶ Law Rep. 7 Eq. 488

KITCAT *v.* SHARP.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, DECEMBER 14, 1882.

[Reported in 52 *Law Journal, Chancery Division*, 134.]

THE plaintiff in this action was a clergyman, who had bought ten shares in the Union Trust Company of the defendant Henry Gould Sharp, a stock and share broker, not a member of the Stock Exchange. The statement of claim alleged that the plaintiff had been induced to take the shares by false representations contained in letters and circulars sent to him by the defendant. He claimed a declaration that he had been induced to take the shares by such fraudulent misrepresentations, and consequential relief by rescission, or, in the alternative, damages. A number of similar actions had been brought by other persons against the same defendant.

The defendant wrote to the plaintiff a letter, which he sent together with a copy of the statement of claim, having marginal comments of a strong character on the allegations in the statement of claim. The following is an extract from that letter :

" Such a statement of claim is enough to rouse any man's feelings. I shall have them reprinted, and send them round to the other misguided plaintiffs, asking if it is their intention to send in a *fac-simile* tissue of falsehoods; in fact, I should not hesitate a moment in having a few thousands struck off with my remarks (facts, not lies), bringing in the loss I saved you on the sixty shares, and sending them round with copies of my letters to you to the clergy, addressed from the *Clergy List*. You deserve such treatment. Some years since I was done out of 1,100*l.* by a nobleman. I printed all his letters and my replies, and sent 4,000 copies (an immense sheet) to the nobility to show the man up. He deserved such treatment. I got 6*d.* in the pound out of the baron. When I begin I go on."

This was a motion on behalf of the plaintiff to restrain the defendant from the threatened publication of the statement of claim and comments.

Harry Greenwood for the plaintiff.

Joseph Beaumont for the defendant.

FRY, J. It appears to me that if the threat contained in the letter were carried into effect, it would be calculated to interfere with the fair trial of the action; it would be calculated to prejudice the plaintiff, and render it difficult for him to obtain justice if justice were on his side. That such a course of action is a contempt of court

I cannot entertain the slightest doubt. So long ago as 1742 it was laid down by Lord Hardwicke, in a motion against the printers of *The Champion* and *St. James's Evening Post*,¹ "that nothing is more incumbent on courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons, parties in causes, before the cause is finally heard." Further down in the same case he said, "There are three different sorts of contempt. One is scandalizing the court itself. There may be likewise contempt of court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard."

It appears to me that the threatened act of the defendant would tend in this case to the two latter species of contempt. It is both abusing a party concerned and prejudicing mankind before the cause is heard. It appears to me, therefore, clearly that there would be contempt of court.

If so, there arises the question whether I ought to stop that course of action, or whether the only proper course would be, as is contended by his counsel, to imprison him for contempt when committed. It appears to me I have plainly jurisdiction to prevent the threatened conduct. Only observe what would be the effect if I had not the jurisdiction. It would be that the court, seeing that a fair trial is likely to be interfered with by a contempt of court, would be powerless to prevent such contempt, and powerless to prevent the fair trial from being interfered with. It might be so because there might be a decision to that effect binding on me; but there is nothing of the sort; and in the next place nothing is more familiar than cases where the court does interfere to prevent a threatened contempt of court. The case to which Mr. Beaumont has referred, with respect to wards of court, is an exercise of that jurisdiction against persons not even parties to the action or cause. Lastly, if authority were wanted for the exercise of the jurisdiction in this very way, there is the case that has been cited of *Coleman v. The West Hartlepool Railway Company*, in which the Vice-Chancellor, Sir William Page Wood, restrained publication.

Against that no single case has been brought, though Mr. Beaumont has argued the case with his usual ability and industry. I hold, therefore, that I have the jurisdiction and the obligation in the present case to restrain the publication.

¹ 2 Atk. p. 469 (case 291).

GEE v. PRITCHARD.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 28, 1818.

[Reported in 2 *Swanstons* 402.]

THE bill stated that William Gee, late of Beddington Park, in the county of Surrey, deceased, the late husband of the plaintiff, for many years before, and at the time of his death, resided in the mansion of Beddington Park; that the plaintiff had not any issue by William Gee, and after their marriage William Gee informed the plaintiff that there was a boy whom he maintained, and intended to educate and bring up, and that he was desirous that the boy should reside at Beddington during the vacation from school, and that he intended to educate him and procure him a living in the church, or to place him in some other respectable situation in life; that the plaintiff having great affection for her husband, and being desirous to comply with his wish in that respect, consented to receive the boy, whose name was William Pritchard (the defendant, the Rev. William Pritchard), and he was accordingly brought to the house at Beddington, and spent his vacation there; that Pritchard, after that time, and while he remained at school, was brought to Beddington, as his home during the vacations, or times of recess from school, and after he quitted school, and was a student at the University of Cambridge, and until his marriage in the year 1810, he was permitted by William Gee and the plaintiff to return to and reside at Beddington as his home; that William Gee, by having Pritchard frequently at his house on such occasions, had, and showed great fondness for him, until some time before his death, and the plaintiff also entertained a good opinion of Pritchard, and had great regard for him, which she often expressed to him by letters and otherwise, and she at all times paid him great attention, and showed him great kindness.

The bill further stated that William Gee died in July, 1815, having first, by his will, divided his property between the plaintiff and Pritchard, and made such provision for Pritchard therein as he thought proper and just; that, for many years during the time the plaintiff was so acquainted with Pritchard, she was in the habit of writing letters to, and receiving letters from him, on various family and other subjects, some of them of a private and confidential nature, and some, as the plaintiff believes, relating to his morals and conduct in life, and containing advice to him; that for some time past the plaintiff had had great reason to be displeased and dissatisfied with Pritchard and his conduct, and in consequence thereof they had

ceased to be on terms of friendship; and Pritchard, from resentment, as the plaintiff believed, had threatened and intended to print and publish copies of the letters which were so written by the plaintiff to him, or extracts therefrom; and wrote a letter to the plaintiff, dated the 14th of May, 1818, containing the following passage: "My life, as far back as memory serves, more particularly from my first residence at Beddington, together with the grounds I had for being differently situated, viz., your professions contained in your letters, will be published in the middle of June."

The bill charged that Pritchard was proceeding to print and publish, or cause to be printed and published, the letters of the plaintiff, or true copies or copy thereof, and extracts therefrom, and that he and the defendant Anderson had caused public notice thereof to be given, by advertisement in the newspapers, and otherwise, and particularly in a newspaper called *The Morning Post*, on Friday, the 9th of July, in the words following: "In the press, and speedily will be published by William Anderson, bookseller, Piccadilly, 'The Adopted Son; or, Twenty Years at Beddington,' containing Memoirs of a Clergyman, written by himself, and interspersed with interesting correspondence"; and that Anderson was printing and about to publish the same, or some work in which the letters, or copies thereof, or extracts therefrom, were introduced.

The bill also charged, that the plaintiff never consented or agreed that the letters, or any of them, or any extracts or extract therefrom, should be published; and, in answer to an alleged pretence of the defendant Pritchard, that the letters were his private property, and that he was entitled to print and publish them, or to make such use of them as he might think proper, charged, that the letters were wholly written and composed by the plaintiff, and were not the property of Pritchard, but of the plaintiff, and that Pritchard had not even a joint, or partial, or any property whatever therein, and that Pritchard, if he ever had any interest in the letters, had parted with the same, for that he some time since sent to the plaintiff a parcel of letters and papers, accompanied by a letter from him, stating, that the parcel contained the original letters which the plaintiff had so written to him (the parcel of letters being then in the plaintiff's possession); but the plaintiff charged, that Pritchard, before he sent to the plaintiff the parcel of original letters, and without the consent of the plaintiff, took, or caused to be taken, a copy thereof, from which copy so taken he intended to print and publish copies or extracts.

The bill further charged, that the defendants were, or were to be, jointly interested in the profits, if any, which should be made or produced by the sale of the publication, or that Anderson had, or was to

have, some joint interest or concern with Pritchard in the publishing and sale of the letters or work; that the publication of the letters, by the defendant, was a breach of private confidence, or violation of the right and interest of the plaintiff therein, and was intended to wound her feelings, and could have no other effect.

The bill prayed that the defendants might be respectively restrained by injunction from printing or publishing the original letters, or any copies or copy of the original letters, so written by the plaintiff, or any extracts or extract therefrom, and might be decreed to deliver up to the plaintiff, or to destroy, the original copy of the letters so taken or made by the defendant Pritchard, and all printed and other copies thereof, or of any extracts therefrom, which they might respectively have in their possession or power.

The allegations of the bill being verified by affidavit, a motion was made for an injunction, which the Lord Chancellor, after inquiring for an instance of an injunction issued against the person to whom the letters were addressed, granted on the authority of *Thompson v. Stanhope*.¹

"It was therefore prayed that the defendants may be respectively restrained, by the order or injunction of this court, from printing or publishing the said original letters, or copies or copy of the original letters written by the plaintiff, or extracts or extract; which, upon hearing, etc., is ordered accordingly, until the defendants shall appear to, and fully answer, the plaintiff's bill, or this court make other order to the contrary." (Reg. Lib. A. 1817, fol. 1819.)

On this day a motion was made, on behalf of the defendant, to dissolve the injunction.

The affidavit of the defendant, in support of the motion, stated, that he was the natural son of William Gee, the late husband of the plaintiff, and that about nineteen years ago, and when he was of the age of eleven years, he was, with the consent of the plaintiff, and with her knowledge of the relationship between himself and Mr. Gee, taken into Mr. Gee's house, and from that time till Mr. Gee's decease, was uniformly treated by him as his son, and was placed by him, and at his expense, under the tuition of a clergyman, who lived a few miles from Beddington Park, and during his vacations he went to, and resided at Beddington Park, as his proper home; that in the year 1806 he was sent by Mr. Gee to St. John's College, Cambridge, where he was, by Mr. Gee's direction, entered at first as a pensioner, and afterwards as a fellow commoner; and that during the whole time, from the period at which he was so received into Mr. Gee's house, until the

¹ Amb. 737.

time of his death, he was uniformly treated by Mr. Gee as his son, and with the greatest kindness and indulgence, and was introduced by him into the society in which Mr. Gee lived, which was of the first rank in the neighborhood of his residence, and was always given to understand by Mr. Gee, that he was to be provided for by him, as if he had been his son by marriage, and therefore the defendant conceived he should succeed to the bulk, or a large portion of his property, and that, in forming his acquaintance and connection in the world, he was to act as having such expectations ; that from the time when he was so taken into the house of Mr. Gee, until Mr. Gee's death, he was always treated and regarded by the plaintiff as her adopted son, and she, during the whole of that time, declared the greatest love, and regard, and esteem for him, and wrote to him, and also to his wife, previous to and subsequent to their marriage, a great number of letters expressive of such sentiments, and the defendant, at her invitation, always treated her as his mother, and called her by that name.

The affidavit further stated, that in the year 1815 Mr. Gee died, having, by his will, made some provision for the defendant during the life of the plaintiff, and having bequeathed the sum of £17,000 to the defendant, or his family, after the plaintiff's death, provided she did not, by any deed or will, otherwise dispose thereof ; that the provision made by the will, independent of the sum of £17,000, was very inadequate to the expectation Mr. Gee had held out to the defendant ; but that he was perfectly certain, that in making such inadequate provision, and also in making the bequest of £17,000 to the defendant or his family, subject to alteration by the plaintiff, Mr. Gee was fully persuaded, from the affectionate conduct and great regard exhibited by the plaintiff to the defendant, that the defendant might safely depend for his future support on her affection ; and that Mr. Gee wished to put it in the plaintiff's power to evince, by something more than words, her affection and regard to the defendant ; that immediately after the decease of Mr. Gee, a great alteration took place in the conduct and deportment of the plaintiff to the defendant ; and it was, by the direction of the plaintiff, suggested to the defendant within a few days after Mr. Gee's death, that the defendant was no longer to call her by the name of mother, as circumstances were altered ; and that she had for some time not only withdrawn her regard from the defendant, but treated him with great contumely, and expressed herself concerning him in the most injurious and opprobrious terms ; that the defendant having, as well during the life of Mr. Gee, as since his decease, entertained such expectations as were authorized by the conduct and expressions of Mr. Gee, and of the plaintiff herself, and

having, in his intercourse with his neighbors and acquaintance, conducted himself as having such expectations, and having in his conversation occasionally alluded to the same, and especially having, upon his marriage, represented to his wife and her parents, that he had such expectations, the plaintiff had, as the defendant had been informed and believed, stated or represented, that neither herself nor Mr. Gee ever gave the defendant any reason to entertain any such expectations, and that, therefore, the defendant's representations in that respect were wholly without foundation, or to that effect ; from which circumstance, and from the great influence with which the large property of the plaintiff, in the country, and her great character invested her, doubts had been entertained of the defendant's veracity in such his representations ; that he had never committed any act to forfeit the regard and esteem of the plaintiff, nor was there anything in his moral or prudential conduct, or in his conduct to the plaintiff, that could justify her withdrawing her regard and esteem from him, and treating him in the injurious manner above mentioned ; but notwithstanding, the defendant found, that from the alteration in the behavior of the plaintiff towards him, reports and suspicions had prevailed in his neighborhood, that the defendant had been guilty of some gross act or acts of misconduct, or that he had acted without due deference to the plaintiff, or Mr. Gee, and especially, that the defendant's marriage was contrary to their wishes ; whereas both the plaintiff and Mr. Gee, at and long previously to the time when the defendant's marriage took place, approved thereof, in the most unqualified terms.

The affidavit proceeded to state that the defendant was the rector of Walton on the Hill, and many of his parishioners were tenants of the plaintiff ; and from the alteration in the plaintiff's behavior to the defendant, he found himself greatly hurt and lowered in the estimation of his parishioners, and felt it absolutely necessary to lay a statement of the circumstances of his case and conduct before the public, which, supported by the letters of the plaintiff as necessary documents to authenticate the statement, he conceived to be the only means of vindicating his character and conduct to his parishioners and acquaintance, and the noblemen and gentlemen with whom he had been in the habit of associating ; and he accordingly had written and prepared such a statement, under the title mentioned in the bill, which, with the permission of the court, he intended to publish and distribute gratuitously, among his acquaintances and neighbors, but which he never intended should be sold, nor had he the least view to gain a profit on such publication ; that he had therein no vindictive object nor motive of resentment, nor any wish to lay open or publish to the

world any of the plaintiff's secrets, or to wound her feelings, or to compel or induce her to comply with any applications made to her by the defendant, nor any other object than the defendant's own vindication; that the letters, and parts of letters, which he intended to publish, related solely to the defendant and his wife, as connected with the plaintiff and Mr. Gee; and that several of the facts before stated he could have supported, by inserting some of the plaintiff's letters; but, in deference to the decision of the court in granting the injunction, he had forbore so to do.

The farther affidavit of the plaintiff, in opposition to the motion, stated, that William Gee, the late husband of the plaintiff, and the reputed father of the defendant Pritchard, by his will, among other things, gave to Pritchard the sum of £4,000, which he had received, and also, during his life, the interest of the sum of £6,000 (which he had also received from time to time), and after the defendant's death he gave the £6,000 for the benefit of the wife and children of the defendant; and he also gave the sum of £17,000 to trustees, in trust, to pay the interest to the plaintiff for her life, and after her death, to pay the principal to such persons, and in such manner as she should appoint; and if she made no appointment, then, upon trust, to pay out of the dividends thereof an annuity of £100 to H. S. for her life, and subject thereto to pay the dividends to Pritchard, and after his death for the benefit of his wife and children.

The affidavit of the plaintiff further stated, that she considered the provision so made by the will of Mr. Gee, compared with his fortune, an adequate provision for the defendant, and as much as the defendant had, or as Mr. Gee gave him, any reason to expect; that she believed the reason why Mr. Gee gave to her a power of disposing of the sum of £17,000 after her decease, was to give her a check upon his conduct, and to enable her to withhold all benefit thereof from the defendant, if, by his conduct, he should not, in her opinion, entitle himself to the same, and that such power was not given to her to evince, by more than words, her regard to Pritchard; that Pritchard was never given to understand from her that he had reason to expect Mr. Gee's fortune, and that, in a letter written by him to her, so late as the 16th of February, he admitted the same; she denied that she had treated Pritchard with great contumely, or that she had expressed herself in any injurious and opprobrious terms concerning him; but she said, that having great reason to be displeased and dissatisfied with his conduct, she had expressed such her displeasure and dissatisfaction.

The affidavit proceeded to state, that since the death of Mr. Gee, the plaintiff procured for the defendant the presentation to the rectory

of Walton on the Hill, of the annual value of about £400, of which he was then in possession as incumbent; and she had also, on his representation of having incumbered himself with debt, given to him the sum of £4,500, to enable him to pay his debts, and had since given to him other large sums of money; that Pritchard still continued to apply to her for money, and pressed her to allow him to receive the interest of the sum of £17,000, and to give up to him her life interest therein, with which she refused to comply.

The affidavit expressed her belief that Pritchard had been induced to threaten to publish the letters which she had written to him, for the purpose of compelling or inducing her to comply with such application, and not of vindicating his character and conduct; that, on the 18th of March, she received a letter from him, addressed to her, whereby he expressed himself, amongst other things, as follows: "I allude to the interest of the £17,000, which, if you will allow me, without further comment, to receive the interest of, at S. W.'s, I shall give you no further uneasiness, either by my presence or by further application"; that the letter mentioned in the bill to have been written by Pritchard, and sent to her with the original letters which she had formerly written to him, was dated the 6th of April then last; and therein, after accusing himself of ingratitude to the plaintiff, and apologizing to her for his past conduct, he begged her forgiveness, and disclaimed or abandoned all right to the letters, as being unworthy of the sentiments and expressions of kindness contained in them.

Mr. Hart, Mr. Wetherell, and Mr. Sidebottom, in support of the motion.

THE LORD CHANCELLOR. It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes; excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime—an exception arising from that peculiar jurisdiction of this court.

Argument in support of the motion resumed.

An attempt will be made to sustain the injunction, on the ground that the publication of the letters will be painful to the feelings of the plaintiff.

THE LORD CHANCELLOR. I will relieve you also from that argument. The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the court.

Argument in support of the motion resumed.

The injunction then must rest on one of two grounds: 1. That the plaintiff possesses, in the letters, a property either general or literary; 2. That the publication of them is a breach of trust.

It will be difficult to establish, that letters may be the subject of literary property. The cases of *Pope v. Curl*,¹ and *Thompson v. Stanhope*,² render it doubtful to what extent the court recognizes the doctrine of property in letters. Thus Pliny's letters are said to have been written or revised for publication.³

THE LORD CHANCELLOR. My predecessors did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt in all these cases is this: If I had written a letter on the subject of an individual, for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.⁴

¹ 2 Atk. 342.

² Amb. 737.

³ Plin. Episi. l. 1, ep. 1.

⁴ "Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience." —SELDEN, Table Talk.^(a)

(a) I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first

I understand the Vice-Chancellor in the case of Lord and Lady Perceval *v.* Phipps,¹ not to have denied Lady Perceval's property in the letters, but to have inferred, from the circumstances, that she had authorized, and for that reason could not complain of, the publication. . . .

Argument in support of the motion resumed.

Letters between public functionaries on public business, or between private individuals on private business, where the nature of the subject discussed made it evident that the correspondence could not be designed for publication, may constitute an exception.

THE LORD CHANCELLOR. Are the cases which establish the jurisdiction founded in a right to restore the property, or to restrain the publication? I think that the decisions represent the property as qualified in some respects; that by sending the letter, the writer had given, for the purpose of reading, and, in some cases, of keeping it, a property to the person to whom the letter was addressed, yet, that the gift was so restrained, that *ultra* the purposes for which the letter was sent, the property was in the sender. If that is the principle, it is immaterial whether the publication is for the purpose of profit or not. If for profit, the party is then selling; if not for profit, he is giving, that, a portion of which belongs to the writer. I doubt whether the court has proceeded so far as to decree the restoration of letters; for the principle on which it interferes recognizes a joint property in the writer and the person to whom they are addressed.

Argument in support of the motion resumed.

It is clear that the defendant was entitled to retain the letters, and retaining to read and show them to his friends or to strangers. These modes of publication there is no pretence for restraining: upon what principle then can the publication by printing be restrained? An equity, or *jus proprietatis*, in the plaintiff, must apply equally to every mode of publication, and, confessedly, not authorizing the restraint of some modes, cannot by any rational distinction authorize the restraint of any mode. The argument is the same, whether the supposed right of the plaintiff is founded in property or breach of confidence.

THE LORD CHANCELLOR. Does the common injunction ever go so far? When the court enjoins a defendant from publishing the book

¹ 2 Ves. & Beam. 19.

introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are we must look, of course, rather to the more modern than the more ancient cases.—JESSEL, M. R., *In re Hallett's Estate*, 13 Ch. Div. 696, 710.—ED.

of another, has it ever restrained him from reading it, or showing it to his friends? Such an injunction will not prevent the defendant from carrying the book to a reading-room, or reciting it in public company;¹ but is that a reason for not restraining publication? The usage limits the extent of the jurisdiction.

Argument in support of the motion resumed.

Admitting that the right of property in the person receiving the letter is qualified, the question whether that right of property includes a right of publication must depend on the circumstances of each case. Whenever the writer is entitled to the restoration of the letter, the party from whom he is entitled to recover it can have no right of publication. The exclusive property in the manuscript includes every right of using it, and, among other uses, for the purpose of publication. But where the correspondent is entitled to retain the manuscript, great difficulty occurs in restricting his right of publication.

In this case the defendant was unquestionably entitled to retain the letters; and he is now entitled to publish them for the vindication of his character. The cases of *Pope v. Curl*, and *Thompson v. Stanhope*, proceed, on the supposition, that the person in possession of the letters was the depositary only, and not the proprietor; but whenever the person to whom they are sent is entitled to retain them, being proprietor of the substance on which they are written, he is proprietor of their contents, and may therefore publish them. The injunction in — *v. Eaton*² was granted on the fact of purchase of the letters by the writer from the defendant.

On the ground of breach of trust, of which there is no evidence, the injunction could not be maintained; this court interferes with publications only as the subject of property—*Southeby v. Sherwood*.³ The injunction in the *Earl of Granard v. Dunkin*⁴ was founded on a right of property in the receiver of the letters.

The LORD CHANCELLOR. The question is, what is the conduct of the plaintiff, which, by the defendant's affidavit, is represented as his justification in the publication of the letters? If the court possesses jurisdiction by reason of a right of property, and if the principle of the decision in *Lord and Lady Perceval v. Phipps* would require me to declare, that, notwithstanding that right of property, the plaintiff's conduct had been such, that she was not entitled to the interference of the court, the defendant is at liberty to insist on either or both of

¹ Acting a dramatic composition on the stage, is not a publication, within stat. 8 Ann. c. 19; but injunctions have been granted to restrain acting as an invasion of copyright. *Morris v. Kelly*, 1 Jac. & Walk. 481.

² 13 April, 1813. ² Ves. & Beam. 23, 27.

³ 2 Mer. 435.

⁴ 1 Ball & Beat. 207.

those points; provided that he is not concluded by the act which Lord Apsley so strongly censured, of returning the originals and retaining copies. That act is particularly stated in the bill as an abandonment of property. If the defendant had any right of property, it was in the originals. He has not averred that the letters will prove the statement in his affidavit, though that is to be inferred. The defendant might destroy the letters,¹ and so destroy the plaintiff's expectation of profit from them.

Sir Samuel Romilly and Mr. Roupell for the injunction.

It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication.² It is not necessary that they should be written for profit: Dr. Paley having prepared sermons designed for gratuitous distribution among his parishioners, the court held that his executors possessed a property in them, and, at their instance, interfered to restrain the publication by a bookseller. The question here is, whether the defendant has established that he is about to publish these letters for purposes essential to justice? Without that proof he cannot avail himself of the decision in *Lord and Lady Perceval v. Phipps*, a decision which admits much remark. No such case is established by his affidavit, and for the purpose of establishing one, a course more effectual than any affidavit would have been the production of the intended publication. The publication, not of a simple narrative of facts, but of a novel, is an extraordinary expedient for the vindication of character.

THE LORD CHANCELLOR. The decision of the Vice-Chancellor proceeded on the principle, that in that case the publication was necessary for the purposes of justice; the letter of the defendant, written in April, is decisive, that the publication here is not necessary for those purposes. What occasion was there for the defendant to inform the public, that he intended certain papers for distribution among his private friends?

Argument for the injunction resumed.

¹ See 3 Wooddeson Lectures, 415.

² "At etiam literas quas me sibi misisse diceret, recitavit, homo et humanitatis expers, et vitæ communis ignarus. Quis enim unquam, qui paululum modo bonorum consuetudinem nosset, literas ad se ab amico missas, offensione aliqua interposita, in medium protulit, palamque recitavit? Quid est aliud tollere à vita vitæ societatem, quam tollere amicorum colloquia absentium? Quām multa joca solent esse in epistolis, quæ prolata si sint, inepta esse videantur? Quām multa seria, neque tamen ullo modo divulganda?" Cic. Phil. ii.

The present decision will constitute a most important precedent. If, on these affidavits, the injunction is dissolved, no man can be restrained from publishing the letters which he has received from another ; all that will be necessary to authorize the publication is a quarrel, an assertion, that the disclosure is required for the vindication of his character. When the defendant returned the originals, clandestinely retaining copies, he abandoned all right of property in the letters.

The LORD CHANCELLOR. This case came originally before me on a motion made *ex parte* by the plaintiff Mrs. Gee, the widow of the father of the defendant, who is represented in the pleadings as his illegitimate son. The affidavit of the defendant states his introduction in that character; that he was known and received as a son, and treated by his father and his wife with great kindness ; the affidavit seems to intimate some dissatisfaction with the representation made in the bill, of the circumstances of his introduction ; that is, perhaps, not very material, not a matter which much blends itself with the consideration that I must give to the subject; but his introduction is certainly represented differently in the bill and in his affidavit. It is stated, that the plaintiff entertained a great kindness for him, and that she expressed that kindness by letters in the life of his father. I collect from the last affidavit, that Mr. Gee gave to the defendant a legacy of £4,000; the interest, for life, of £6,000, devoting the principal of that sum for the benefit of his children; and that he gave to the plaintiff the interest of £17,000 for her life, with a power which, under the circumstances, appears to me not unfit, to appoint that sum, not by deed merely, but by deed or will; and I am bound to take it to be his pleasure, that she should have the power, during the whole course of her life, of judging to whom, at her death, it should devolve; an absolute power, of the exercise of which no person has any right to complain. The testator also declares, that if his widow does not think proper to make a different disposition, that sum shall go to the defendant; but as, between the defendant and the plaintiff, the rule by which I am governed, is the will of his father. I understand that it was the intention, that he should have the living which he now has, which was in the gift of Mr. Gee's brother, but not vacant at his death ; the plaintiff contends, that she in some sense obtained it for him; it is not going far to conjecture, that if she had opposed, it would not have been given to him. The defendant had thus received £4,000 from his father's bounty, and the interest of £6,000, and had this contingent right in £17,000, with the prospect of the rectory.

The plaintiff represents, that during many years she had addressed to the defendant letters of a private and confidential nature; that she

afterwards had reason to be dissatisfied with his conduct, and they had ceased to be on terms of friendship ; and as evidence of his intention to publish the letters, her affidavit states the advertisement. The defendant represents, that he neither did nor does intend to publish the letters for profit ; and insists, that it is too hard a criticism to infer from the words, "to publish," after this explanation, that he must be understood to mean publication for sale ; and yet I cannot but think, that the defendant will, on reflection, admit, that if it was his intention merely to give these letters to his friends and relations, it was not prudent to announce his intention by advertisement. The advertisement thus held out to the public, though of a publication intended only for private circulation, has this effect, that those who see the publication know its nature, but those who saw only the advertisement, might have been led to believe, that there was something in the letters more to the disadvantage of those concerned, than they really contained ; and I cannot think this a prudent course.

It has been said, that the bill contains no allegation of a right of property; but there is an express charge, that by returning the originals, the defendant Pritchard abandoned any right of property which he might have had in the letters. The defendant Anderson has not filed any answer or affidavit; but I am bound, by the affidavit of the defendant Pritchard, to believe that he did not intend to publish the letters for sale.

With reference to charges of wounding feelings, looking at the jurisdiction of the court to be, if not entirely, mainly, relative to the question, whether the plaintiff has or has not, property, I shall trouble myself no farther than by simply stating the circumstances of the case as they appear in the affidavits: if they prove a breach of trust, a violation of a pledge which has been given to the plaintiff, concerning these letters, that is not the ground on which I profess to proceed ; but it is necessary to refer to this for the purpose of pointing out the extreme difference between this case and the case of Lord and Lady Perceval *v.* Phipps.

The argument of Mr. Wetherell has confirmed doubts which have often passed in my mind relative to the jurisdiction of this court over the publication of letters ; but I profess this principle, that if I find doctrines settled for forty years together, I will not unsettle them. I have the opinion of Lord Hardwicke and of Lord Apsley, pronounced in cases of this nature, which I am unable to distinguish from the present. Those opinions have been acquiesced in without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I may entertain, I will lend it only when the parties bring them into question before the House of Lords.

The statement of the defendant's affidavit I take to be true, as I must have taken his answer. I cannot trust myself with any such question, as whether Mr. Gee should have left to him a larger fortune; what were the expectations that he might form in consequence of what passed between him and his father, is a point on which I cannot enter. The provision made by the will is that which this court is bound to say, as between the father and the son, must be considered proper. The defendant may most honestly entertain an opinion that more was intended; but when I see such a power given to the widow, I must understand that his father meant that, to the time of her death, her will should be free.

Supposing the affidavit of the defendant to have stated, with a great deal more precision, the representations which seem to him to call in question his veracity, and in consequence of which he is under a belief that it becomes him to set himself right in the opinion of the world, the plaintiff's representations, that the defendant's marriage was disapproved by herself and her husband, and so as to all the rest; it would have been a more welcome duty to have considered, first, Whether the court has jurisdiction on this subject; secondly, Whether the motives which the defendant states to have led to this publication were so created by the plaintiff's conduct, that I ought to follow the example of the Vice-Chancellor in *Lord and Lady Perceval v. Phipps*, and to say, that, let it be ever so clear that the plaintiff has either a sole or a joint property in the letters, the court will not interfere between the parties; but the affidavits state a transaction with regard to the letters, with no part of which am I acquainted, except what appears in the affidavits. Repeating that the testator had left £17,000 to the discretion of the plaintiff, that she had given to the defendant £4,000 since the testator's death, and had, at least in her own judgment, been instrumental in obtaining the living which he now holds, her affidavit, asserting her husband's intention to intrust to her a control on the defendant's conduct (and I take the facts to be, that she had given to him various sums, and that he continued to press for money), proceeds to state that the defendant returned her letters, having first taken copies, and now threatens to publish them. Whether that is an act which, if it can be done, ought to be done, the defendant is to decide. I am to decide whether it can be done. If it is supposed, that by reading the letters any impression may be made on my mind different from that which I am about to state, I will forbear to state it, till I have read them; otherwise I am now ready to proceed.

The counsel for the defendant intimated, that they had read one of the letters and thought it unimportant.

The LORD CHANCELLOR. I am of opinion, that the plaintiff has a

sufficient property in the original letters to authorize an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. Wetherell has urged with so much ingenuity, I say only that though a letter is a subject of property, capable of being much more largely dealt with, in communication, than books, as, by reading to others, repeating passages, etc., yet the court has never been alarmed out of the practice of granting injunctions relative to letters to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them: it is not deterred from giving that relief because it cannot give other relief more effectual.

In stating what Lord Hardwicke says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of the court. In *Pope v. Curl*, Lord Hardwicke went out of his way to state what he thought the doctrine on the subject of letters. Though the letters of eminent men, no one can suppose that they were all meant for publication; there are many passages in Swift's letters which he would be unwilling to have published. Lord Hardwicke says, "Another objection has been made by the defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver: possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world." If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds, "for, at most, the receiver has only a joint property with the writer."¹

No one can read the case of *Thompson v. Stanhope* without seeing that this was understood at that time to be the doctrine of the court. Publication was there advertised in November, and the application to the court not made till March, and on that circumstance Lord Apsley proceeded in recommending the arrangement which he afterwards mentions: "The executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had applied earlier, before the expense of printing was incurred."² That is a strong part of the case. Those were letters of two classes, written by a father to his son; one class relating to the characters of individuals. The communication being made by letter is *prima facie* evidence, that that is all the communication which, on the subject of those characters, the writer intends to make. So of what relates to education: though they concern public characters, and a public sub-

¹ 2 Atk. 342.

² Amb. 739, 740.

ject—education, no one can maintain, that those discussions found in private letters gave to the person who received the letters a right to carry into public the opinions of the writer on those public characters, and the system of education. Lord Apsley therefore granted the injunction, observing, that the defendant “did very ill in keeping copies of the characters, when Lord Chesterfield meant that they should be destroyed and forgotten.” Lord Apsley also cites the case of Mr. Forrester,¹ which certainly does not apply to letters. I believe the parties came to a compromise.

The doctrine is thus laid down, following the principle of Lord Hardwicke: I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

Such is my opinion; and it is not shaken by the case of Lord and Lady Perceval *v.* Phipps. I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters; and I think that it will be extremely difficult to say where that distinction is to be found between private letters of one nature, and private letters of another nature. For the purposes of public justice publicly administered, according to the established institutions of the country, the letters must always be produced; I do not say that of justice administered by private hands; nor do I say that there may not be a case, such as the Vice-Chancellor thought the case before him, where the acts of the parties supply reasons for not interfering: but that differs most materially from this case. In April last, the defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord Hardwicke says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return. Now I say, that, if in the case before the Vice-Chancellor, Lady Perceval had given to Phipps a right to publish her letters, this case is the

¹ “In the case of Mr. Forrester *v.* Waller, 13 June 1741, an injunction for printing the plaintiff’s notes, gotten surreptitiously without his consent, was granted.” 4 Burr. 2331. In Donaldson *v.* Beckett, 2 Bro. P. C. Ed. Toml. 129, is enumerated among other “injunctions for printing unpublished MSS. without license from the author, 13 June 1741; Forrester *v.* Waller, for Forrester’s Reports.” Id. 138.

converse of that; and that the defendant, if he previously had it, has renounced the right of publication.

On these grounds the injunction must be continued.

Motion refused.¹

¹ There are only two grounds upon which it has been insisted that private letters are an exception from the general doctrine. The first is, that the transmission of the letters vests the whole property in the receiver, and operates as an absolute gift. The second, that if the writer retains any property at all, it is only in such letters as are stamped with the character and possess the attributes of literary compositions.

The first ground of exception, as plainly overruled by the decisions, was very properly abandoned by the counsel of the defendants. He rested his whole argument upon the second; and, holding himself excused from any closer examination of the English cases, relied upon the decision of Chancellor Walworth, in Hoyt *v.* McKenzie, as a binding and conclusive authority. (3 Barb. Ch. Cases, 324.)

Now, it cannot be denied that the decision in Hoyt *v.* McKenzie is an express authority in favor of the defendants; and if, as is asserted, we are under a positive obligation to follow that decision, it must be owned that we have no power to grant to the plaintiff the relief which he claims. The Chancellor, in that case, dissolved an injunction, which the plaintiff had obtained to restrain a very mischievous and dishonest publication of confidential letters, upon the sole ground "that it was evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author for the purpose of publication, which he never would consent to have published." They are the exact words of the Chancellor which we have quoted, and it is plain that they amount to a positive denial that an author of private letters, which he wishes to suppress, and not to publish, has any right of property at all—that he has any right to say that they shall not be published by another, unless he means to publish them himself. The Chancellor did not deny that, as a general rule, the author of an unpublished manuscript has at common law an exclusive right of property, the violation of which may justly be prevented by an injunction; for he distinctly admits that this is the settled law. But he certainly meant to deny that the plaintiff, in the case before him, had any property in the letters which he desired to suppress, and consequently, the position upon which he rested his judgment may be briefly stated as follows: Private letters not intended to be published, have no value whatever; and when they have no value for the purpose of publication, they are not property. In a subsequent part of his opinion, the Chancellor expresses, in terms, his approbation of the final decision of Vice-Chancellor McCoun, in Wetmore *v.* Scovill (3 Edwards Ch. R. 515), that letters not possessing the attributes of literary compositions, are not, as property, entitled to protection.

In proceeding to examine, as we now propose, whether it is possible to reconcile this opinion of the late Chancellor, with the law as settled by prior decisions, and among these, the very cases to which he has himself referred, we must not be understood as meaning to detract in any degree from the weight and authority to which his decisions, as those of a very able, learned, and laborious Judge, are generally and justly entitled. The judges of this court have frequently manifested the high sense which they entertain of his judicial merits, and it is with

POLLARD *v.* PHOTOGRAPHIC COMPANY.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,
DECEMBER 21, 1888.

[*Reported in Law Reports, 40 Chancery Division, 345.*]

THE plaintiffs, a husband and wife, sued the defendant, a photographer carrying on business at Rochester under the style of the Photographic Company. A claim was indorsed on the writ for an injunction to restrain the defendant "from selling or offering for sale or

reluctance that we dissent, on any occasion, from any deliberate judgment which he has pronounced. But we deny that a recent and solitary decision of any Judge, however eminent, ought to be regarded by us as conclusive evidence of the existing law; and we deny that we are bound by the decisions of the Chancellor, in the same sense in which we are bound by those of the court of ultimate resort. We stand now in the same relation to the Court of Appeals, as that in which he stood to the Court of Errors; and in the cases in which we exercise an equitable jurisdiction, have succeeded to all the powers which he possessed in similar cases. We have, therefore, exactly the same right to review, and, when convinced that errors have intervened that ought not to be perpetuated, to overrule his decisions, that he himself, and his successors in office, had not the Court of Chancery been abolished, might and would have exercised. It is known to us all that the cases are numerous in courts of equity, as well as of law, in which judges have felt it their duty to reconsider and reverse their own decisions and those of their predecessors; and deplorable, indeed, would be the actual state of the law (as none who have examined the valuable treatise of Mr. Greenleaf, on overruled cases, will doubt), had not these powers of revision and correction been frequently and firmly exercised. We must all remember that the judgment in *Hoyt v. McKenzie*, from the sanction which it apparently gave to a very dishonorable proceeding, excited general surprise and regret, so that even those who admitted its legality, were anxious to relieve the law from the reproach which it occasioned. We are convinced that this reproach, that of giving a sanction to immorality, is one to which the law was never justly liable, and from the continuance of which it ought, therefore, to be freed.

The proposition which we hold to have been settled as law, for more than a century before the judgment in *Hoyt v. McKenzie* was pronounced, is that which was laid down by Sir Samuel Romilly, and affirmed by the decision of Lord Eldon, in *Gee v. Pritchard* (2 Swanston, 418). It is that "the writer of letters, though written without any purpose of publication or profit, or any idea of literary property, possesses such a right of property in them that they can never be published without his consent, unless the purposes of justice, civil or criminal, require the publication." If this proposition be true, it follows that the distinction which has been supposed to exist between letters possessing a value as literary compositions, and ordinary letters of friendship or business, is wholly groundless. The right of property is the same in all, and in all is entitled to the same protection.

The earliest case, and that which may be truly said to have established the

exposing by way of advertisement or otherwise a certain photograph of the plaintiff, Alice Morris Pollard, got up as a Christmas card, and from selling or exposing for sale or otherwise dealing with such photograph."

law, since its controlling authority is admitted in all that follow, is Pope *v.* Curl (2 Atk. 342). An unknown person, by means never explained, had possessed himself of a large number of private and familiar letters, which had passed between Mr. Pope and his friends, Swift, Gay, and others, and had printed them secretly in Ireland, in a book entitled, "Letters from Swift, Pope, and others." The defendant, a piratical bookseller in London, had purchased and advertised for sale the printed copies of this book—and the plaintiff had obtained an injunction restraining the sale.

It was upon a motion to dissolve this injunction, that the case came before Lord Hardwicke. It is briefly reported, but there is no difficulty in collecting either the grounds upon which the motion was rested, or those upon which it was denied.

It was contended by the defendant's counsel, that as the printed book contained only letters never intended to be published, and written on familiar subjects—such as inquiries after the health of friends, and other similar topics—it was not a learned work, and therefore was not within the meaning and intention of the statute of Anne (8 Anne, c. 19), vesting the copyright of printed books in the authors. The argument was, that as the writer of such letters could not, by printing them, secure a copyright to himself, he could have no right to prevent them from being printed by others. Lord Hardwicke put an end to this argument, by observing that it would be extremely mischievous to make a distinction between a book of letters, published by the permission of the writer or receiver, and any other work; and to show that the objection, that the letters were not written to be published, was groundless, he remarked, that it would apply equally to sermons which the authors never intended should be published, but which are collected from his notes, and published after his death. In a subsequent part of his opinion, and in reply to the same objections, he observed, and proved the justness of his taste in the observation, that letters never intended to be published, and written on familiar subjects, are usually more interesting and valuable than those elaborately written and originally intended for the press.

We have here, then, a positive decision, that private letters, although not intended to be published, and however familiar and trivial the subjects to which they relate, are a legitimate subject of a statutory copyright, which a court of equity is bound to protect; and it is an obvious and necessary consequence of this decision that the writer of such letters has an absolute right to forbid their publication by another, since by such a publication, if not restrained by an injunction, his own right to publish them for his own benefit, under an exclusive copyright—a right inherent in him and his representatives, until it is chosen to be asserted—would be defeated. Had not this consequence, obvious and necessary as it is, been overlooked, the obligation of a court of equity to protect, by an injunction, the writer of such letters, without any other inquiry than into the fact of his authorship, could never have been drawn in question by any who admit the authority of the decision itself.

The second objection which was urged by the defendant's counsel in Pope *v.*

A motion was now made on the part of the plaintiffs for an interim injunction in terms of the claim till the hearing. By arrangement the motion was treated as the trial.

Mrs. Pollard was photographed at the defendant's shop at Roches-

Curl, was far more plausible. It was, that the sending of letters is in the nature of a gift to the receiver, and consequently, that the writer retains no property at all.

The answer of Lord Hardwicke to this objection I shall give in his exact words as reported, in order that it may be seen how entirely they exclude any reasonable doubt as to its import and effect. His words are—"I am of opinion that it is only a special property in the receiver. Possibly the property in the paper may belong to him, but this does not give license to any person whatsoever to publish them (the letters) to the world; for at most, the receiver has only a joint property with the writer." Such were the grounds upon which this eminent Judge continued the injunction as to the letters written by Mr. Pope, but dissolved it as to those which he had received, plainly because, as receiver, he had no right of property which entitled him to control their publication. The decision was made in 1741. There was no appeal. It has been, from that time to the present, unquestionable and unquestioned law. Doubts have been raised, it will hereafter be seen, as to its meaning and application; none whatever as to its controlling authority. Chancellor Walworth himself refers to it as evidence of that common law which our first State constitution declared could only be altered by legislative authority, and which he held himself bound to follow. If, therefore, he departed from the positions it established, we have his own acknowledgment that he erred.

What, then, are the propositions which Lord Hardwicke, by his decision in *Pope v. Curl*, established as law? It seems to us, that, by the plain and necessary interpretation of his language, they are these:—First, That the receiver of letters has only a special or qualified property, confined to the material on which they are written, and not extended to the letters as expressive of the mind of the writer. Second, That neither the receiver thereof nor any other person has any right to publish the letters without the consent of the writer. And, lastly, That the property, which the writer retains, gives him an exclusive right to determine whether the letters shall be published or not; and, when he forbids their publication, makes it the duty of a court of equity to aid and protect him by an injunction. It appears to us equally certain that these rules are laid down, and were meant to be laid down, as universal in their application, as embracing all letters, whether intended to be published or not, and whatever may be the subjects to which they relate. Not only was there no intimation that there is any distinction between different kinds or classes of letters, limiting the protection of the court to a particular class; but the distinctions that were attempted to be made, and which seem to be all that the subject admits, were expressly rejected as groundless.

The next case, *Thompson v. Stanhope* (Ambler, 737), which is perhaps even stronger than *Pope v. Curl*, came before Lord Bathurst (then Lord Apsley), in 1774. The executors of Lord Chesterfield filed the bill to enjoin the publication, by the widow of his son, of those celebrated letters which, for a series of years, he had written to her husband; and also the publication of certain characters, probably not very flattering, which he had drawn in writing of some of his con-

ter in August, 1888, and paid for likenesses of herself taken from negatives then made and for photographs of other members of her family. It was found by the plaintiffs that a photographic likeness of Mrs. Pollard taken from one of the negatives, got up in the form

temporaries. The motion to dissolve the injunction was made on the ground that Lord Chesterfield had himself given to the widow both the letters and the characters—and the fact seems to have been admitted. But it was contended, on the part of the plaintiffs, that there being no proof of an express authority to publish, none could be implied from the gift, and that consequently the exclusive right to control the publication remained in Lord Chesterfield, and had passed to his representatives. The Lord Chancellor was of this opinion, and, declaring himself bound by the authority of *Forrester v. Waller*, and *Pope v. Curl*, continued the injunction. It does not appear, from the report, to have been alleged that the letters, or characters, were written by Lord Chesterfield with any view to their future publication, or that the publication of either was intended by the plaintiffs.

We come next, after a lapse of nearly forty years, and of more than seventy from the decision of Lord Hardwicke, to the case of *Lord and Lady Percival v. Phipps and another* (2 Ves. & Beames, 19), and we find here, not in the decision itself, but in the somewhat desultory, and wholly extra-judicial remarks of the Vice-Chancellor, Sir Thos. Plumer, the true and only source of all the doubts and difficulties that have been permitted to embarrass the question, and have, unfortunately, led to a conflict of decisions. The bill prayed for an injunction to restrain the publication, by the defendants, of certain private letters, which, it was alleged, had been sent by Lady Percival to the defendant Phipps, and, in its frame, it bore an exact resemblance to the complaint before us. It was described by the Vice-Chancellor "as the naked case of a bill to prevent the publication of private letters, not stating the nature, subject, or occasion of them, or that they were intended to be sold as a literary work for profit, or were of any value to the plaintiffs." Upon this bill, the injunction prayed for was granted by Lord Eldon; and that it was granted upon full deliberation, is evident from the fact that, not considering the statements in the bill sufficiently explicit, he required from Lady Percival, in order to bring the case within *Pope v. Curl*, a positive affidavit that she was the author of the letters. (2 Ves. & Beames, 26). The answer of the defendants, upon which their counsel moved to dissolve the injunction, set forth certain facts, tending to show that the publication of the letters was necessary to repel a charge of falsehood and forgery, which the plaintiffs had publicly made against them. And it was upon the sole ground that the conduct of the plaintiffs had given to the defendants a perfect right to use the letters for their own vindication, that the Vice-Chancellor dissolved the injunction; and the propriety of this decision is not questioned.

But although this was the sole ground of his decision, and the consideration, therefore, of any other question quite unnecessary, the Vice-Chancellor, both upon the hearing and on delivering his final judgment, chose to discuss the general question, how far, and in what cases, a court of equity will interpose to protect the interest of the author of private letters. And in the course of his observations he lays down, in positive terms, the novel doctrine, that it is only when the letters—in his own words—"are stamped with the character of literary compositions," that the writer can be protected by an injunction against their

of a Christmas card, was being exhibited in the defendant's shop window at Rochester. A Mr. Andrews, a clerk of their solicitors, with a view to this action, purchased at the shop from Mr. Bax, the defendant's manager, a copy of Mrs. Pollard's photograph made up as a Christmas card. Affidavits were made by Mr. Andrews and Mr. Bax, for the purpose of the motion, which conflicted as to the details

publication. And he, in effect, asserts that the character and value of the letters of Pope and Lord Chesterfield, as literary compositions, was the true and only ground of the decisions in *Pope v. Curl*, and *Thompson v. Stanhope*, and, consequently, that these cases were inapplicable to that which was before him—it not being pretended that such was the character of Lady Percival's letters. The Vice-Chancellor did not say in terms, that Lord Eldon erred in granting the injunction; but if his remarks were just, and the distinction he stated well founded, such is the necessary consequence. If his doctrine was law, and his interpretation of former decisions correct, it is clear that the injunction ought not to have been granted.

The vindication of Lord Eldon from the criticisms and implied censure of Sir Thomas Plumer,* will seem, to all who have any knowledge of their relative standing and authority as jurists and judges, a very gratuitous task—and it is a task from which we should certainly have abstained, had it not unfortunately happened that the rash speculations of the latter have been followed, in preference to the deliberate judgments of the former.

It is undoubtedly true, that the letters of Pope, and of Lord Chesterfield, possessed a far more than ordinary value as literary compositions; but there is not the slightest evidence that it was upon this distinctive character and value that Lord Hardwicke, in *Pope v. Curl*, or Lord Bathurst, in *Thompson v. Stanhope*, founded his decision.

On the contrary, in each case, the doctrine is laid down in general terms, with no intimation that there is or can be an exception, that the writer of letters has an exclusive right, not only to publish them himself, but to forbid their publication by others; and that a court of equity is bound to enforce his prohibition by its own injunction. That these cases were thus understood by Lord Eldon, is certain, since otherwise the injunction which the Vice-Chancellor dissolved, would never have been granted.

It cannot, therefore, be said, that the views of Sir Thomas Plumer derive any countenance from prior decisions. It remains to be seen whether they have any solid foundation in reason. All that he says proceeds upon a distinction, which, it seems to us, either does not exist at all, or, if it exists, has no practical value. In other words, furnishes no rule which a court of justice can, rationally, or consistently, apply. The assertion is, that some private letters are literary compositions, and some are not. Those which are, may be pro-

* Extract from the private diary of Sir Samuel Romilly, under date of April 9th, 1813—about two months before the decision in *Percival v. Phipps*:

“A worse appointment than that of Plumer to be Vice-Chancellor, could hardly have been made. He knows nothing of the law of real property, nothing of the law of bankruptcy, and nothing of the doctrines peculiar to courts of equity.”—*Memoirs of the Life of Sir Samuel Romilly*, vol. ii., p. 310.

of what passed on the occasion of the purchase. The result of the evidence is stated in the judgment. The plaintiffs had not registered any copyright in the negative.

Cozens-Hardy, Q. C., and *Silvester* for the plaintiffs.

Emden for the defendant.

NORTH, J. In the month of August last the female plaintiff called

tected as property; those which are not, may be stolen and published with impunity: the writer has no property, and sustains no injury.

But we agree with Mr. Justice Story (2 Story R.), that every letter is, in the general and proper sense of the term, a literary composition. It is that, and nothing else; and it is so, however defective it may be in sense, grammar, or orthography. Every writing, in which words are so arranged as to convey the thoughts of the writer to the mind of a reader, is a literary composition; and the definition applies just as certainly to a trivial letter, as to an elaborate treatise, or a finished poem. Literary compositions differ widely in their merits and value, but not at all in the facts from which they derive their common name.

To create, therefore, the distinction that has been assumed to exist, it is evident that the words, "literary composition," must be understood in a peculiar and restricted sense, which renders them applicable to a particular class of letters, and not to any others; and it is just as evident that, to enable courts of justice to act upon the distinction, this restricted sense of the words must be ascertained and defined. This is only saying, that the distinction must be understood before it can be applied. Hence, the necessary inquiry is, what are the peculiar circumstances, the distinctive qualities, or attributes, that must be found to exist, in order to stamp upon letters the character of literary compositions? Upon this inquiry, the observations of Sir Thomas Plumer throw no light whatever. The learned Judge shrouded his meaning in loose and vague generalities—and from these we must endeavor to extract it. He probably meant to say, either that letters are not to be regarded as literary compositions, unless it appears, that they were originally written with the intent to publish them, or, that their author would derive from their publication a certain profit, or, that from their intrinsic merits their publication would be a benefit to the world. Intended publication, pecuniary value, or intrinsic merit, must furnish the requisite test—nor are we aware that any other has been suggested or can be stated.

Now it is manifest, that if either of these circumstances is to be admitted as the test of literary composition, it is a test which cannot be limited in its application to private letters. It is just as applicable, not only to all other unpublished manuscripts, but to all printed books. If a letter, destitute of certain qualities or attributes, is not a literary composition, neither is a book to which exactly the same qualities are wanting. The inherent qualities of the manuscript are not altered by its publication—and certainly no addition is made to them by the process of printing. Hence, if private letters, which, in the restricted sense which Sir Thomas Plumer adopts, are not literary compositions, as not within the spirit of the acts of Parliament securing a copyright to authors—for such is the argument—are not entitled to protection as literary property, it follows, that printed books which, in the same sense, are not "literary compositions," as equally not within the spirit of these acts, ought to be excluded

at the place of business in Rochester of the defendant, a person who carries on business as, and is sued by the name of, the Photographic Company, and there had her photograph taken in various positions, and for this and for photographs taken of other members of her

from the benefit of their provisions. The statement of this necessary consequence is of itself a sufficient refutation of the whole doctrine of the Vice-Chancellor; for assuredly it has never been pretended that the copyright of the author of a published book is liable to be impeached and defeated by an inquiry into his intentions in writing it, or into the merits or value of his work, as published.

If, therefore, the question, whether a book is a literary composition, can never be raised, as involving that of the right of property, in the author, there is a plain inconsistency in permitting the application of the test to unpublished manuscripts, whether private letters or of any other class. The writer of letters, if he choose to print them himself, may obtain a valid copyright—and whether he will obtain it rests entirely in his own discretion: so long, however, as the letters are preserved, the right of obtaining the statutory copyright exists in the writer and his representatives; and while it exists, it is, in its nature, a right of property, which a court of equity is as much bound to protect as any other. It is a right, however, which the court effectually defeats by permitting, in any case, the publication of letters without the consent of the writer. There can be no exclusive copyright, if all may publish with impunity.

To pass from these general observations.

The proposition that in familiar letters, not intended by the writers to be published, there can be no property which a court of equity will protect from invasion, is precisely that which, in *Pope v. Curl*, and in *Thompson v. Stanhope*, is expressly overruled. There is no evidence that the letters of Pope, and his friends, or those of Lord Chesterfield, were originally written for the press. And in relation to those of Pope, the report shows that the fact was admitted to be otherwise. There is, moreover, a positive absurdity in making the character of any manuscript as a literary composition, depend upon the extrinsic and accidental fact of the intention to publish. Apply this test, and the plays of Shakespeare are not literary compositions, since there is every reason to believe that not a single play was written with any view to its future publication.

There is the same confusion of ideas and language, in making the character of a manuscript, and the right of property in the author depend upon the accident of its value for publication—its pecuniary or marketable value. Booksellers are eager to purchase the copyright in the autobiography of a shameless adventurer, or self-convicted impostor; but we doubt whether one can be found within the limits of the Union, who, without any hazard of competition, would dare to publish, at his own risk and expense, the *Principia* of Newton, or the *Système* of La Place, or even a full edition of the prose works of Milton.

Rejecting, then, as we must, the tests "of intended publication," and "pecuniary value," it remains to consider whether the character of letters as literary compositions, and therefore literary property, may be determined by a reference to their contents and intrinsic merits—the merits of language and thought, of style, and sentiments.

It must be admitted that the differences, in these respects, between familiar

family, she paid a sum of £7 10s. The evidence is silent as to what passed upon this occasion, and therefore I infer that the transaction was one of the ordinary kind, and that no special terms or conditions of any sort were agreed upon. In November last it came to the

letters, as between all other productions of the intellect, are wide and strongly marked, and fully justify their distribution by critics into many distinct classes; but we seriously deny, that it is possible to extract from these differences any rule of classification, which a court of justice can be warranted to adopt, as a rule of decision.

If the question, whether the letters of which the publication is sought to be restrained, from the nature of the subjects to which they relate, of the sentiments they convey, or of the style in which they are clothed, deserve to be classed with literary compositions, is to be determined by the Judge to whom the application for relief is made, it is evident that his determination must and will be governed, by his own personal, and it may be, peculiar opinions, taste, studies, and associations. The determinations in such cases will, therefore, be just as various and inconsistent as the literary taste and attainments, and the casual predilections and prejudices of the judges by whom they are pronounced. The letters extolled by one, as full of interest or instruction, will be condemned by another, as utterly worthless. The injunction granted to-day will be dissolved, or, in cases not distinguishable, be denied to-morrow; and the questions of the right of property, and its title to protection, will be resolved, not by the application of rules of law to facts, admitted or proved, but in the exercise of a discretion, constantly varying and purely arbitrary. The decisions, in most cases, will appear to be, and in many will be, the mere result of accident or ignorance, prejudice or caprice. Whether the letters which he has written possess literary merits which render them worthy of publication, is a question which it belongs to the writer alone, and the public, to determine. It is exactly one of those which, from the necessary and total absence of any fixed rules of principles or decision, a court of justice can never rightfully entertain.

It follows, from these remarks, that the test of intrinsic merits must also be rejected. At first view, it seems less unreasonable than that "of intended publication," or "pecuniary value"; but, as it admits no certain definition, and is necessarily shifting, and precarious in its application, it is, in reality, more objectionable than either. Any definite rule is better than an unlimited discretion.

The error which lies at the foundation of all the reasoning of Sir Thomas Plumer, is that which an able writer, to whose valuable treatise on the law of copyright we have before referred, has very clearly stated. The Vice-Chancellor confounds the rights of property in an unpublished manuscript, with those in a published book. The exclusive right of the author of the book is to take the entire profits of publication. That of the writer of the manuscript, to control the act of publication, and, in the exercise of his own discretion, to decide whether there shall be any publication at all. (Curtis on Copyright, p. 93.)

In making the right of property in letters depend on their value for publication, as the Vice-Chancellor certainly does, he denies, by a necessary implication, that the writer has any title to relief at all, when his object is not to publish, but suppress. If the character or value of letters, as literary composi-

knowledge of the plaintiffs that the defendant was exhibiting in his shop window, apparently for the purpose of sale, one of the photographs of the female plaintiff, got up as a Christmas card. A copy of the photograph as originally taken and also the copy so exhibited

tions, alone creates a right of property in the writer, these facts, when an action is brought to restrain an unlicensed publication, as those upon which the right to maintain the action depends, must necessarily be averred in the complaint. If averred in the complaint, they may be denied in the answer; and if so denied, they must be proved upon the trial. The plaintiff must then either abandon his suit, or make the necessary proof by making the letters themselves, or copies, exhibits in the cause—and thus publish them himself to all the world, to prevent their publication by the defendant.

According to this doctrine, should a faithless clerk, who has secretly taken copies of the confidential business letters of the merchant who employed him, from motives of revenge, and with the design of blasting the credit and ruining the fortunes of his employer, threaten to publish them, the merchant would have no redress, in equity, or at law. He cannot say that his letters have value as literary compositions, or that he meant to publish them for his own benefit; he has therefore no property that a court of equity can be required to guard from invasion; and as there is no violation of any of his rights of property, he can recover no damages in an action at law. An indignant public may condemn the vile treachery of the clerk, but it is a treachery that equity will not prevent, and the law refuses to punish. Such is the doctrine of Sir Thomas Plumer, and I regret to say, the doctrine in Hoyt *v.* McKenzie. We cannot, however, believe that such is, or ever has been, the doctrine of the common law, and that it has found no favor in England, but, on the contrary, has been decisively rejected, the case next to be cited will conclusively show.

In Gee *v.* Pritchard (2 Swanston, 402), the last of the English cases, it is interesting to observe, with what a gentle, yet firm, hand, Lord Eldon sweeps away the unsubstantial theories and distinctions of his Vice-Chancellor, and, scattering doubts that ought never to have been raised, resettles the law upon its old and true foundations. The case was before him on a motion to dissolve the injunction which he had previously granted, forbidding the publication, by the defendant, of a number of private and confidential letters, which had been written to him by the plaintiff in the course of a long and friendly correspondence. The plaintiff was a widow lady, and the defendant the natural son of her late husband; and they had lived for many years on terms of great intimacy and kindness. Disputes, however, had arisen between them relative to the property left by her husband; and in consequence of these, at the request of the plaintiff, he had returned to her the original letters; but he had kept copies, from which he now claimed the right to publish them, in vindication of his own proceedings and conduct. Two questions were raised and fully argued by the most eminent counsel then at the chancery bar. First, whether the plaintiff had such a property in the letters as entitled her to forbid their publication—it being fully admitted that they had no value whatever as literary compositions, and that she never meant to publish them; and, second, whether her conduct towards the defendant, had been such as had given him a right to publish the letters in his own justification or defence. These questions were properly argued as entirely distinct, and each was explicitly determined by the Lord Chancellor, in

in the window are now before me, and it appears that the former, which is what is commonly called a vignette, has been decorated by the addition thereto, above and below the figure, of scrolls of what I suppose are intended for leaves, with the superscription, also in leafy

favor of the plaintiff. The motion to dissolve the injunction was accordingly denied, with costs. It has been said, that it was through considerable doubts that Lord Eldon struggled to this decision: but the doubts which he expressed related solely to the question, whether it ought originally to have been held that the writer of letters has any property in them after their transmission. He had no doubts whatever that such was the established law, and that he was bound to follow the decisions of his predecessors. He expressly says, that he would not attempt to unsettle doctrines which had prevailed in his court for more than forty years, and could not, therefore, depart from the opinion which Lord Hardwicke and Lord Apsly had pronounced in cases (*Pope v. Curl*, *Thompson v. Stanhope*,) which he was unable to distinguish from that which was before him. (2 *Swanston*, 450.) Subsequently, in support of his opinion that the plaintiff had a sufficient property in the original letters to authorize an injunction, he refers to the language of Lord Hardwicke (quoting the exact words, in *Pope v. Curl*), as proving the doctrine that the receiver of letters, although he has a joint property with the writer, is not at liberty to publish them, without the consent of the writer; which is equivalent to saying that the latter retains an exclusive right to control the publication. He then adverts to the decision of Lord Apsly in *Thompson v. Stanhope*, as following the same doctrine, and declares that he could not abandon a jurisdiction which his predecessors had exercised, by refusing to forbid a publication in a case to which the principle they had laid down, directly applied. (Id. pp. 424-427.) He then says, "Such is my opinion; and it is not shaken by the case of Lord and Lady Percival *v. Phipps*"; and significantly adds, "I think it will be extremely difficult to say where the distinction is to be found between private letters of one nature and private letters of another nature"; by "difficult," plainly meaning "impossible," since if a case could exist in which the distinction could be made, it was the case then before him, in which it was certain that the letters were not written for publication, nor then meant to be published—had no literary merits to render them worthy of publication, and, if published, would have no pecuniary value; consequently, were not, in the sense of Sir Thomas Plumer, literary compositions, and literary property. We do not see how it was possible to overrule more effectually the distinction, made by Sir Thomas Plumer, between private letters of one nature, and those of another, and the doctrine which he founded on that distinction, than by refusing to apply them in a case to which, if they were ever to be admitted as law, they were evidently applicable, and in the most emphatic sense of the term.

It has, indeed, been said that the decision of Lord Eldon, in *Gee v. Pritchard*, is not at all inconsistent with the observations of the Vice-Chancellor in *Percival v. Phipps*, and was not intended to overrule them. It is admitted that Lord Eldon decided that Mrs. Gee had a property in the letters which authorized him to grant and continue the injunction; but it has been insisted that the property, which he held himself bound to protect, was her property in the letters, as a material chattel—that is, her property in the paper on which the letters were written, and which was vested in her in consequence of their having been re-

letters, of the words "A Merry Christmas and a Happy New Year." This step was taken by the defendant without any license or consent from and without the knowledge of the plaintiffs, who had never authorized the use of the photograph by the defendant in any man-

turned by the defendant, and being then in her possession. But, with high respect for the learned Judge by whom this has been said, we find it impossible to believe that the ground of Lord Eldon's decision was such as has been stated. Had such been his meaning, Lord Eldon would never have referred to the decisions of Lord Hardwicke and Lord Apsly, as having established the principle by which he meant to be governed. Neither in *Pope v. Curl*, nor in *Thompson v. Stanhope*, was there a return of the original letters; and in the last case the material property in the letters, it was admitted, was vested in the defendant by an absolute gift from the writer. Any reference to these cases, had the ground of Lord Eldon's opinion, that Mrs. Gee had a property in the letters which entitled her to an injunction, been such as has been supposed, would have been unnecessary and irrelevant; and had he not been fully aware that his opinion was inconsistent with the observations of his Vice-Chancellor, he would not have said that "it was not at all shaken by *Percival v. Phipps*"; nor would he have spoken at all of the difficulty of making a distinction between private letters of one nature and those of another, had he not been urged to make the distinction, and deemed it necessary to overrule it.

There are other reasons, which make it impossible for us to believe that the meaning of Lord Eldon was such as has been imputed to him. As the letters had been returned to Mrs. Gee, we cannot understand how her property in the paper, which was in her actual possession, could be violated or endangered by a publication from the copies which the defendant had kept—and it is not pretended that she had any property in the paper on which these copies were written. And were a property merely in the paper on which letters are written a sufficient ground for an injunction to restrain their publication, it is manifest, that the receiver, who all agree, unless he had returned the letters, has a property in the paper, would have the same right to obtain such an injunction, as the writer: yet we have seen that, in *Pope v. Curl*, Lord Hardwicke dissolved the injunction as to all the letters written to Mr. Pope, upon the ground that, although as receiver he owned the paper, he had no right as such to control and forbid the publication.

It is very true, as the learned Judge to whose peculiar exposition of *Gee v. Pritchard* we refer, has remarked, that Lord Eldon, in that case, disclaimed any right to interfere by an injunction, upon the ground, either that the publication of the letters by the defendant would be a breach of confidence, or would tend to wound the feelings of the plaintiff. It is true, he expressly said, that he could exercise jurisdiction on no other ground than that of property in the plaintiff. But the property which he affirmed to exist, and held himself bound to protect, was that which Lord Hardwicke, in *Pope v. Curl*, had clearly defined—the property which in all cases remains in the writer of letters—the property with which he does not part on sending them to the person to whom they are addressed, and which, so long as they exist, entitles him to say that, without his consent, they shall not be published. The property of Mrs. Gee, which Lord Eldon meant to protect, was intellectual, not material; not her property in the paper on which her letters were written, but in the letters themselves, as the

ner, much less its public exhibition or sale for profit as a Christmas card. They accordingly placed the matter in the hands of their solicitors, and a clerk of theirs, Mr. Andrews, subsequently called at the defendant's shop and purchased the exhibit with the above

media of intercourse, conveying her thoughts and wishes to an absent person—as communications of facts, and of her sentiments and feelings. It was these which she did not choose should be exposed to the world; and it was to prevent this exposure, as involving a violation of her property, that the injunction was granted.

It is not meant to be denied that Lord Eldon, in the close of his opinion in *Gee v. Pritchard*, does advert to the return of the letters by the defendant as a material fact; but he adverts to it, not as a fact creating or establishing the plaintiff's title to relief, but as excluding a defence, which might otherwise have been relied on, as a bar to his granting it.

The defendant, it has already been said, claimed a right to publish the letters in vindication of his own conduct; and in reference to this claim Lord Eldon said, that although the defendant, as receiver of the letters, had a joint property in them, so long as he retained the possession, which might have justified his intended publication, yet that, by returning the letters, he had relinquished this property, and renounced any right of publication he might previously have had.*

Had it been possible for us, after a very careful examination of *Gee v. Pritchard*, to entertain any doubts that the import and effect of the decision are such as we have stated, those doubts would probably have been yielded to the reasoning and authority of Mr. Justice Story, who, with an entire decision, has adopted and acted upon the same construction. We refer not alone to his observations in his treatise on equity jurisprudence (2 Eq. Jur. §§ 945-948), but also, and principally, to his elaborate judgment in *Folsom v. Marsh* (2 Story R. p. 100), in which the question of property in private letters distinctly arose, and, with great care, was considered and determined. In the opinion of this eminent Judge, the whole doctrine relative to the rights of property in letters, and the jurisdiction of equity to restrain their publication, together with the limitations to which the doctrine is properly subject, is lucidly stated, and in language which (with a few alterations), as the final expression of our own views and convictions, we shall now adopt. We hold, then, "that the author of any letter or letters, and his representatives, whether they are literary compositions or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and that, without his consent, the letters cannot be published, either by the persons to whom they are addressed, or by any other. But that, consistently with this exclusive right of the author, the person to whom the letters are addressed possesses, by implication, the right of publishing them upon occasions which require or justify the publication. Thus, he may justifiably use and publish them in a suit at law, or in equity, when such

* Vice-Chancellor M'Coun, in *Wetmore v. Scoville* 3 Edwards, 515, the case to which the above observations refer, was doubtless misled by the marginal note of Mr. Swanston, the reporter, which is certainly so expressed as to place the decision of Lord Eldon upon the sole ground of the return of the letters.

words on. There is, as usual in such cases, a difference between Mr. Andrews on the one hand and the defendant's manager, Mr. Bax, on the other, as to what took place on that occasion; but Mr. Andrews states, without being contradicted, that he saw the Christmas card photograph fully displayed in the window, that he went in and asked for a copy of the photograph of the female plaintiff, that Bax opened a glass case on the counter and took out and offered him what Bax calls an ordinary copy, being one like that in the window, but with nothing written on it, and when asked what the price was, replied 2s., and that Andrews then asked for one like that exhibited in the window with the lettering on it. According to the evidence of Andrews, Bax then asked him whether he was a friend of the female plaintiff, and on receiving an affirmative reply, continued that he could not otherwise have let him have it, and then took the copy out of the window and handed it to Andrews, and received the price of 2s. for it. Bax's story is that when asked for the photograph in the window he said it was not there for sale, but only as a specimen with the view to obtaining orders for photographs taken in a similar man-

Dear Penn
use is necessary or proper to maintain his action or defence. So, also, if he has been aspersed or misrepresented by the writer of the letters, or accused of improper conduct in a public manner, he may publish such parts of the letter or letters, and no more, as may be necessary to vindicate his character, and free him from unjust obloquy and reproach. But if he attempt to publish the letters, or any parts of them, against the wishes of the writer, and on occasions not justifiable, a court of equity will prevent the publication by an injunction, as a breach of that exclusive property in the letters which the writer retained." (2 Story R. pp. 110, 111.)

To the weight and accumulation of the authorities which we have now cited and examined, there stand alone, opposed, two decisions in our own courts—that of Vice-Chancellor M'Coun, in *Wetmore v. Scovill* 3 Edwards Ch. R. 515, and of Chancellor Walworth, in *Hoyt v. Mackenzie* 3 Barb. Ch. R. p. 314, and upon these all special comments have been rendered unnecessary by the remarks we have already made. It will be sufficient to say, that in each case an injunction was denied, upon the sole ground that the letters of which the publication against the will of the writer, and for very dishonorable purposes, was sought to be restrained, possessed no value for publication, and none "of the attributes (such is the language employed) of literary compositions." We must, indeed, regret that the learned Judges, by whom these decisions were pronounced, adopted so entirely the speculative views of Vice-Chancellor Plumer, as to deem themselves justified in acting upon the distinction which he invented, and of which no trace is to be found in any case, prior or subsequent; but as we believe, for the reasons that have so fully been given, that in so doing they departed from the established law, we must decline to follow their example.

We think that we are bound to declare the law as laid down by Lord Hardwicke, and followed by Lord Apsly, and clearly expounded, and most distinctly affirmed, by Lord Eldon, and last, not least, by our own Story. And it is with

ner, but that Andrews pressed for it, and that Bax asked him three separate times whether he had the authority of the female plaintiff to purchase it, and only sold the photograph to him upon his replying that he had such authority. Andrews positively denies that there was such or any conversation about an authority to purchase. Andrews also states that before leaving the shop he asked Bax whether he had any authority to sell such photographs, to which Bax replied, "Yes, to personal friends of Mrs. Pollard," and this is not denied by Bax, though I do not find anything in the evidence to justify his statement that he had such authority. I do not think it necessary to consider which version of the conversation is the more reliable or probable. The case may be disposed of upon the footing that the facts, so far as in contest, are as stated by the defendant's witness, so that the matter stands thus: when the female plaintiff's photograph was asked for a copy was at once produced from a case on the counter and offered for sale for 2s., without any remark; it was only subsequently, when the copy in the window was asked for, that any conversation took place as to the right to sell it, and even as to this the

no ordinary satisfaction that, in closing this discussion, we find ourselves in a condition to affirm that the rules of law relative to the publication of private letters, are in perfect harmony with those of social duty and sound morality, and, in the protection which they afford to individuals, consult and promote the highest interests of society.

We therefore decide that the plaintiff, upon the face of his complaint, and according to the established doctrines of equity, is entitled to the injunction for which he prayed, and in the terms in which it was originally granted.

We are also of opinion that no justifiable cause has been shown by the defendants, Judd and McKay, for their intended publication of the plaintiff's letter, of which, by secret and unexplained means, the defendant, Judd, has obtained a copy.

The receiver of a letter may, indeed, publish it, when its publication is shown to be necessary for the vindication of his rights or conduct; but this license has never been extended to a person whose possession of a letter, or of the copy of a letter, as acquired without the consent of the writer or receiver, is wholly unlawful. Could this objection be removed, it does not appear that these defendants seek to publish the letter for the purpose of vindicating themselves. Their sole object, as we understand the affidavits, is to fix what they deem an odious imputation, upon the character or conduct of the plaintiff. Their object is not defence, but accusation. To such a design a court of equity can lend no aid or countenance.

The injunction must, therefore, be continued, as to the defendants Judd and McKay, until a final hearing and decision. It must, however, be dissolved as to the other defendants who have denied in their sworn answer that they have any possession or control of the letter, or any power to direct or prevent its publication. No costs are given on this motion to any of the parties.—DURER,
J., Woolsey *v.* Judd, 4 Duer 379, 388-408.—ED.

defendant claims to be justified in selling it to any person who alleges that he is a personal friend of the female plaintiff, or that he has her authority to purchase it, and Bax states that this is the usual custom of photographers. Bax also states in his affidavit that immediately after he was served with the writ he removed the Christmas card photograph from the window, and it has not since been exhibited. But it will be remembered that the copy purchased by Andrews on the 9th of November, had been taken away by him ; and the copy removed when the writ was served on the 13th of November must have been another copy of the same photograph substituted in the window for that sold to Andrews. And it is difficult to reconcile the fact that there were more copies than one made with the allegation that the one sold was not intended for sale, but merely as a specimen to invite orders for others to be taken in a similar manner.

The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say "express or implied," because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that a photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained ; and an injunction is granted, if necessary, to restrain such use ; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass ; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer : and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power con-

fidentially placed in his hands merely for the purpose of supplying the customer ; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

The principles upon which I rest my judgment are well known, and of familiar application ; and, though I am not aware that any case has been decided as to the negative of a photograph, there are many analogous cases in the books. In *Murray v. Heath*,¹ the owner of some drawings employed the defendant to engrave plates from them, and the defendant, having done so, struck off some impressions from the plates before handing them over, which impressions his assignees sold after his bankruptcy. An action was brought by the owner of the drawings, founded on the Copyright Acts, and also in trover for the prints so struck. The action failed on both these heads, but Lord Tenterden said, in the course of his judgment, “The engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract.” And, again, a little further on, “As to the count in trover, that cannot be maintained unless the prints therein mentioned were the property of the plaintiff. But they were the property of Heath, who caused them to be taken from his own engraving, though he may be liable to an action for his breach of contract in not delivering all the prints so taken.” Such contract was not express, but was implied from the nature of the employment. Again, the recent case of *Tuck v. Priester*² is very much in point. The plaintiffs were the unregistered owners of the copyright in a picture, and employed the defendant to make a certain number of copies for them. He did so, and he also made a number of other copies for himself, and offered them for sale in England at a lower price. The plaintiffs subsequently registered their copyright, and then brought an action against the defendant for an injunction and for penalties and damages. The Lords Justices differed as to the application of the Copyright Acts to the case, but held unanimously that, independently of those Acts, the plaintiffs were entitled to an injunction and damages for breach of contract. Lord Esher said :³ “The plaintiffs entered into a written contract with the defendant by which the defendant undertook to make a specified number of copies of a picture which belonged to the plaintiffs, in order that the plaintiffs might be able to sell those copies for their own profit. The contract being a written one, it

¹ 1 B. & Ad. 804, 811.

² 19 Q. B. D. 629.

³ 19 Q. B. D. 635, 638.

must be construed by the writing alone, and the plain, honest meaning of it was this: ‘ You are to make those copies for us, and then you are to return the picture to us, and you are not to make any other copies for your own benefit.’ That term was implied as plainly as anything could be. Instead of doing this, the defendant, after he had made the specified number of copies for the plaintiffs, made other copies of the picture for himself, with the intention of selling them for his own profit, and he sent a number of those copies to England with the intention of selling them there, and, what was worse, of selling them at a lower price than that at which the plaintiffs were selling theirs. That was a plain breach of contract, and under such circumstances I cannot doubt that, quite irrespectively of the Act of 1862, a Court of Equity would grant an injunction and damages against the defendant.” The Master of the Rolls then stated his reasons for coming to the conclusion that an action would lie under the statute, and after doing so said: “ The plaintiffs, therefore, are entitled under the general law, by reason of the defendant’s breach of contract, and of the trust reposed in him, to an injunction and damages, and they are entitled to the same injunction and damages under the statute.” Then Lord Justice Lindley says:¹ “ I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract, and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.” That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase “ a gross breach of faith,” used by Lord Justice Lindley in that case, applies with equal force to the present, when a lady’s feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof.

It may be said that in the present case the property in the glass

¹ 19 Q. B. D. 638.

negative is in the defendant, and that he is only using his own property for a lawful purpose. But it is not a lawful purpose to employ it either in breach of faith, or in breach of contract. Again, in *Murray v. Heath*,¹ the plates were the property of the defendant, for they had not been delivered to or accepted by the plaintiff. So in the case of *Duke of Queensberry v. Shebbeare*,² the defendant was restrained from publishing a work of the Earl of Clarendon, although a person had been expressly allowed by the owner to make and retain as his own a copy of the manuscript, which copy he had sold to the defendant. There, too, an agreement or condition was implied that the manuscript should not be published. Again, it is well known that a student may not publish a lecture to which he has been admitted, even though by his own skill he has taken a copy of it in short-hand ; and the receiver of a letter may not publish it without the writer's consent, though the property in the paper and writing is in him ; and many similar instances might be given.

It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labor ; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law ; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed ; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same Act provides that no proprietor of copyright shall be entitled to the benefit of the Act until registration, and no action shall be sustained in respect of anything done before registration ; and it was, I presume, because the photograph of the female plaintiff has not been registered that this Act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the Act cannot be enforced until after

¹ 1 B. & Ad. 804.

² 2 Eden. 329.

registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of *Morison v. Moat*,¹ and *Tuck v. Priester*,² already referred to, in which latter case the same Act of Parliament was in question.

But the counsel for the defendant did not hesitate to contend boldly that no injunction could be granted in a case where there could be no injury to property in respect of which damages could be recovered in an action at law; and he alleged that this is such a case, and relied on such decisions as *Southeby v. Sherwood*³ and *Clark v. Freeman*.⁴ I have already pointed out why, in my opinion, this is not such a case; but, if it were, the alleged consequences would not follow. Supposing that the present photograph actually was, or that by manipulation of the negative or by the addition of the rest of the figure, or of a background, it was rendered, a libel upon the plaintiffs, by exposing them, for instance, to contempt or ridicule, it is quite clear that in such a case a Court of Law could give damages, and could also, ever since the passing of the Common-Law Procedure Act of 1854, grant an injunction; and ever since the passing of the Judicature Acts each branch of the High Court has the same power. (See *Quartz Hill Consolidated Gold Mining Company v. Beall*.)⁵ The right to grant an injunction does not depend in any way on the existence of property as alleged; nor is it worth while to consider carefully the grounds upon which the old Court of Chancery used to interfere by injunction. But it is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence, as was pointed out by Lord Cottenham in *Prince Albert v. Strange*.⁶ For these reasons the defendant is wholly in the wrong; and as he denies the jurisdiction of the court, the injunction must go as a matter of course; and as the parties have agreed that this motion is to be treated as the trial of the action the injunction will be perpetual, and the defendant must pay the costs of the action.

¹ 9 Hare, 241.

² 19 Q. B. D. 629.

³ 2 Mer. 435.

⁴ 11 Beav. 112.

⁵ 20 Ch. D. 501.

⁶ 1 Mac. & G. 25.

SCHUYLER v. CURTIS.

IN THE SUPREME COURT OF THE STATE OF NEW YORK, JUNE TERM, 1892.

[Reported in 64 Hun 594.]

APPEAL by the defendants, Ernest Curtis and others, from an order of the Supreme Court, entered in the office of the clerk of the city and county of New York on the 19th day of October, 1891, continuing, during the pendency of this action, an injunction restraining the defendants from making or exhibiting a statue of Mary M. Hamilton Schuyler, or causing the same to be made and exhibited in any way ; from soliciting or receiving subscriptions in any way for a statue of the said Mary M. Hamilton Schuyler, and from proceeding in any way with the execution of a project of the so-called "Woman's Memorial Fund Association," to make and exhibit a statue of the said Mary M. Hamilton Schuyler.

Walter S. Logan, for the appellants.

J. P. Ludlow, for the respondent.

VAN BRUNT, P. J. The plaintiff is the nephew and stepson of one Mrs. G. L. Schuyler, and the defendants, with the exception of the defendant Hartley, are the officers and members of an unincorporated association which they call the Woman's Memorial Fund Association.

This association having announced the project of placing a life-sized statue of Mrs. Schuyler, to be designated "The Typical Philanthropist," on public exhibition at the Columbian Exposition, to be held in Chicago in 1893 ; and having announced that a contract had been made with the defendant Hartley, a professional sculptor of some reputation, for the execution of this statue ; and having undertaken to raise money by public subscription for this purpose, this action was brought by the plaintiff, representing and with the approval of all the nearest relatives of the said Mrs. Schuyler, to enjoin the execution of this project ; and a motion was made for an injunction *pendente lite*, which was granted upon the ground that the said Mrs. Schuyler was not a public character ; *i. e.*, had not placed herself before the public, either in accepting public office or in becoming a candidate for office, or as an *artiste* or *litterateur*, and from the order thereupon entered this appeal is taken.

While concurring with the conclusion arrived at by the learned justice below,¹ I cannot subscribe to the doctrine which seems to per-

¹ The learned Justice below, O'BRIEN, J., delivered the following opinion :

This is a motion for the continuance of a preliminary injunction restraining the defendants from proceeding with a project for making and exhibiting a

vade the opinion rendered upon the decision of the motion, that if Mrs. Schuyler had been a public character, as defined by him, this motion should have been denied.

The claim that a person who voluntarily places himself before the public, either by accepting public office or by becoming a candidate for office, or as an artist or literary man, thereby surrenders his per-

statue of the late Mrs. George Schuyler, who before her marriage was a Miss Mary M. Hamilton. Mrs. Schuyler had no children; but the plaintiff, who is a nephew and stepson, brings this action on behalf of himself and all her other nearest living relatives.

The defendants, except Hartley, who is the sculptor engaged to execute the statue, are members of the "Woman's Memorial Fund Association," which has undertaken to raise money by public subscription for a life-size statue of Mrs. Schuyler, to be designated as "The Typical Philanthropist," and has publicly announced its intention of placing this statue on public exhibition at the Columbian Exposition, to be held in Chicago in 1893, as a companion piece to a bust of the well-known agitator, Susan B. Anthony, which bust is to be designated as the "Typical Reformer."

Neither Mrs. Schuyler in her lifetime, nor her husband after her death, knew or consented to the project; and in view of the attitude assumed by plaintiff on behalf of her nearest living relatives, it must be concluded that so far as the family is concerned, the project is unauthorized.

The defendants, however, contend that irrespective of the wishes of the family, they have the right to commemorate her life and worth by a suitable monument, and to that end, to receive subscriptions from such of the public as are disposed to give. They therefore contend that this action is not maintainable at all; and if it were, its maintenance is against public policy.

As to the first point, it is urged that an injunction can only be granted in a case where damages could be recovered in an action at law. This objection to the granting of an injunction was raised in *Pollard v. Photographic Co.* (40 Ch. D. 345), and thus disposed of: "But the counsel for the defendant did not hesitate to contend boldly that no injunction could be granted in a case where there could be no injury to property in respect to which damages could be recovered in an action at law." "The right to grant an injunction does not depend in any way on the existence of property, as alleged; nor is it worth while to consider carefully the grounds upon which the old court of chancery used to interfere by injunction. But it is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of confidence or contract, as pointed out by Lord Cottenham in *Prince Albert v. Strange* (1 McN. & G. 25)."

The claim that the maintenance of the action is against public policy is based upon the argument that a recognition of such a right in relatives might prevent the public from erecting statues to Washington, to Lincoln, or to any other great or distinguished man or woman. I think, however, that the true distinction to be observed is between private and public characters. The moment one voluntarily places himself before the public, either in accepting public office or in becoming a candidate for office, or as an artist or literary man—he surren-

sonality while living, and his memory when dead, to the public to be used or abused, as any one of that irresponsible body may see fit, cannot for a moment be entertained. It is undoubtedly true that by occupying a public position, or by making an appeal to the public, a person surrenders such part of his personality or privacy as pertains to and affects the position which he fills or seeks to occupy ; but no

ders his right to privacy *pro tanto*, and obviously cannot complain of any fair or reasonable description or portraiture of himself.

It has not been shown that Mrs. Schuyler ever came within the category of what might be denominated public characters. She was undoubtedly a woman of rare gifts and of a broad and philanthropic nature ; but these she exercised as a private citizen, in an unobtrusive way. There is no refutation of the status given her by the complaint, which alleges that, "she was in no sense either a public character or even a person generally known either in the community in which she lived or throughout the United States, but that her life was pre-eminently the life of a private citizen. That she was a woman of great refinement and cultivation ; that notoriety in any form was both extremely distasteful to her and wholly repugnant to her character and disposition, and that throughout her life she neither sought nor desired it in any way." Such a person thus described does not lose her character as a private citizen, merely because she engaged in private works of philanthropy. It is sometimes difficult to determine in individual cases when one ceases to be a private and becomes a public character. This, however, does not destroy the value of the distinction, nor the grounds upon which it can be supported. It is equally difficult to apply to individual cases the principle of the reasonableness or unreasonableness of certain acts. As stated, therefore, it not having been shown that Mrs. Schuyler was a public character, her relatives have a right to intervene.

It is true that there is no reported decision which goes to this extent in maintaining the right of privacy ; and in that respect, this is a novel case. But the gradual extension of the law in the direction of affording the most complete redress for injury to individual rights, makes this an easy step from reported decisions much similar in principle. In a recent article of the Harvard Law Review (Dec., 1890, Vol. 4, No. 5), entitled "The Right to Privacy," we find an able summary of the extension and development of the law of individual rights, which well deserves and will repay the perusal of every lawyer. Among other things, it says : "This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law, enabled the judges to afford the requisite protection, without the interposition of the legislature. Recent inventions and business methods call attention to the next step which must be taken for the protection of the person and for securing to the individual what Judge Cooley calls the 'right to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life ; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house top.' For years there has been a feeling that the law must afford some remedy for the unauthor-

further. And certainly his memory, when dead, does not necessarily thereby become public property.

It is urged upon the part of the appellants that even if Mrs. Schuyler were alive, and had the same objection to the defendants' proposed action that the plaintiff now has, she would be remediless and powerless. If such were the fact, it would certainly be a blot upon our boasted system of jurisprudence that the courts were powerless to prevent the unwarranted doing of things by persons who are mere volunteers, which would wound in the most cruel manner the feelings of many a sensitive nature.

It is further urged that the plaintiff has no standing in court, and that the fancied injury to the plaintiff complained of, if any such injury can be in any way discovered, is certainly not such an injury as the court will grant an injunction to prevent, because it is not an injury to his person, to his estate, or to his good name, and is not a violation of his privacy or seclusion, and because the plaintiff stands in the same relation to the defendants and to their project as does all the rest of the world, and in no other relation.

The result of this claim is that when a person is dead there is no power in any court to protect his memory, no matter how outrageously it may be insulted. The feelings of relatives and friends may be outraged, and the memory of the deceased degraded with impunity by any person who may desire thus to affect the living. It seems to us that such a proposition carries its own refutation with its statement.

ized circulation of portraits of private persons ; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer."—*Scribner's Magazine*, July, 1890. "The Rights of the Citizen to his Reputation," by E. L. Godkin, Esq., pp. 65, 67.

Marion Manola *v.* Stevens and Myers, decided by this court in June, 1890, involved the consideration of the right to circulate portraits. The plaintiff alleged that while playing in the Broadway Theatre, in a role which required her appearance in tights, she was by means of a flash light, photographed surreptitiously and without her consent from one of the boxes of the theatre. It is true there was no opposition to the preliminary injunction being made permanent ; but this court issued one to restrain any use being made of the pictures so taken.

Pollard *v.* Photographic Co., already referred to, is another instance where an injunction was issued against the unauthorized exhibition or sale of photographs or other likenesses of private persons.

These and the celebrated English case of Prince Albert *v.* Strange (2 DeG. & M. 652; s. c. on appeal, 1 McN. & G. 25) are a clear recognition (as shown by the article in the Harvard Law Review, *supra*) of the principle that the right to which protection is given is the right of privacy.

Upon the facts presented on the motion, and the law applicable thereto, the motion to continue the injunction until the trial should be granted. (27 Abb. N. C. 397, 402.)—ED.

It cannot be that by death all protection to the reputation of the dead and the feelings of the living, in connection with the dead, has absolutely been lost. The memory of the deceased belongs to the surviving relatives and friends, and such relatives have a right to see that that which would not have been permitted in respect to the deceased when living, shall not be done with impunity when the subject has become incapable of protecting himself. It is undoubtedly true that cases of the character now before the court are not to be found in the books. But it is probably the first time in the history of the world that the audacious claim which is here presented has ever been advanced. If it had, we have no doubt the books would have contained a record in connection with the same.

The fact that the plaintiff has suffered no pecuniary damage, redress for which is sought in this action, is no answer to the application, because one of the most important departments in the jurisdiction of courts of equity is the prevention of wrongs which would be otherwise irreparable because courts of law cannot afford any remedy in damages.

The order appealed from should be affirmed, with costs.

BARRETT, J., concurred.

Order affirmed, with costs.¹

¹ Schuyler v. Curtis, New York Supreme Court, Special Term, January, 1893. Trial by court without a jury.

Action by Philip Schuyler against Ernest Curtis and others to enjoin proceedings by defendants for the erection of a statue of Mary M. Hamilton deceased, the stepmother and aunt of plaintiff, on the ground that its erection and exhibition were unauthorized and would cause pain and distress to the relatives of the deceased. (For the complaint in this case in full, see 27 Abb. N. C. 387.)

The further facts are fully stated in the opinion.

James B. Ludlow (*Ludlow, Philips & Winthrop*, attorneys), for plaintiff.

Charles M. Demond (*Logan, Clark & Demond*, attorneys), for defendants.

INGRAHAM, J. The decision of the General Term (64 Hun 594, aff'g 27 Abb. N. C. 387) in affirming the order continuing an injunction which granted the relief asked for by the plaintiff in this action, entitles plaintiff to judgment for such relief.

I wish, however, to add a few words to state my entire concurrence in the views expressed by the presiding justice, in delivering the opinion of the court on that appeal. All of the surviving relatives of Mrs. Schuyler unite in asking the court to enjoin the defendants from soliciting or receiving subscriptions for a statue or bust of Mrs. Schuyler, and from making such a statue or causing the same to be made or exhibited. These defendants are an irresponsible voluntary association, and are acting without public authority, and against the express wishes of every relative and connection of Mrs. Schuyler.

The defendants have shown no right or authority, therefore, to make and exhibit a statue of Mrs. Schuyler.

The only serious question seems to be whether, considering defendants have

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THE PEOPLE OF THE STATE OF NEW YORK, APPEL-
LANTS, *v.* THE CANAL BOARD OF THE STATE
OF NEW YORK & OTHERS, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 30, 1874.

[Reported in 55 *New York Reports* 390.]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, reversing a judgment entered upon the decision of the court at Special Term, in favor of the plaintiffs, and ordering a new trial. (Reported below 1 N. Y. S. R. [T. & C.] 309.)

no legal right, has the plaintiff such an interest as entitles him to ask the interposition of a court of equity to prevent the defendants from doing an unauthorized act, which will cause pain and distress to him and the other relations, and for which a court of law can afford no relief. The infliction of mental pain and distress by the wrongful or unauthorized act of another, is recognized as giving a cause of action in many cases. In cases of libel and slander, where a person is injured by the negligent act of another, in fact, in all actions of tort where the wrongful act of another causes an injury, a recovery is allowed for mental pain and distress and disgrace, caused by such wrongful act. So, also, in an action for a breach of contract of marriage.

The law thus recognizes that the infliction of such distress and disgrace, caused by the wrongful act of another, is a ground for a recovery against the wrong-doer. Does not plaintiff occupy this position? He is a nephew and a stepson of Mrs. Schuyler. He alleges, and the other relatives of Mrs. Schuyler allege, that the erection of a statue by these defendants would cause pain and be considered by them a disgrace, and this injury would be permanent, for it is not intended that such a statue should be destroyed at the end of a week, or a month, or a year, but it is likely to last for at least as long as the lives of any of the living relatives of Mrs. Schuyler. It is evident that it would be impossible to estimate the damages that would be sustained from such a continuing act, not only at the time the statue was exhibited, but in the future possibly to be enhanced by the use that would be made of the statue in the future. It seems to me that this is in the nature of a continuing wrong that has and will cause damage which, from the nature of things, it would be impossible to estimate; and thus the case is brought directly within a recognized head of equitable jurisdiction, and the court is authorized to enjoin the continuance of the act.

That the making and exhibition of the statue or representation of a deceased person in many instances is calculated to cause pain and distress and disgrace, is clear. Thus, to make a wax image of a deceased individual, leaving behind him sensitive children and other relatives, and exhibit it as a part of an exhibition of criminals and others noted for their brutal characteristics, would clearly cause pain and disgrace to the living; and if such an exhibition could be enjoined, can the court say that another exhibition of a representation of a deceased parent would not, because the court was of the opinion that the proposed representation should not (although it was satisfied that it did, as a matter of fact) cause the children pain? Clearly not. Once establish the right to an injunction against such an exhibition in any case, and the question is whether

This action was brought to restrain the canal board from acting under chapter 740, Laws of 1872, upon the ground of the unconstitutionality of that act, and to restrain the other defendants, Lord and Skinner, from applying to the board under that act.

On August 6, 1870, the defendant, Skinner, entered into a contract for the widening and deepening of the narrow canal in Black Rock harbor. This contract was assigned to the defendant, Lord. The plan was subsequently changed with Lord's assent. Lord went on with the work, under the changed plan, until August 6, 1872, when the canal board cancelled the contract, and Lord has been paid

the proposed exhibition does, as a fact, give them pain, does cause them disgrace.

It is also to be considered that, as before stated, the statue is to be permanent in its nature, and the use to which it will in the future be put, cannot be foretold. What may now be a comparatively unobjectionable use, may in the future be painful and disgraceful. I think it clear, therefore, that the act of the defendants in proposing to have a statue of Mrs. Schuyler made and exhibited was unauthorized; that such act has caused and would cause the plaintiff and the other relatives of Mrs. Schuyler pain, and be considered by them a disgrace, and it was therefore an unauthorized act; that the injury caused was permanent; in its nature continuing, and it was impossible to ascertain the damage that had been caused or that a continuance of the unauthorized act would cause.

The question as to whether the public, as represented by the State or Nation, have not the right to erect a statue in honor of one of its citizens, who has held public office, or who has rendered service to the State, is not presented. The State or Nation has a right to call on its citizens to do many acts and sacrifice many interests that a voluntary association of citizens cannot ask. A citizen must fight the battles of the State; must contribute his money to its support; must submit his person and property to its control to prevent the spread of contagious disease; must allow the State to take his property for public use. But it would hardly be claimed, even by these defendants, that they could call on the plaintiff to thus subordinate his private interests to satisfy their desire for public approbation or for pecuniary advantage; and it may well be that where the State desires to thus honor one of its distinguished soldiers, sailors, or civil servants, and present to future generations a model to be followed, the private wishes of the relatives of such a person must then give way to the public good. But these defendants do not occupy that position, and can hardly claim that their wish has the force of action by the State or Nation.

It is not claimed that this action of the defendants is a libel. It is an unauthorized act which has caused and will in the future cause damage. It is unlike a libel, because that is a simple publication for which the damage can be ascertained. In this case the injury is continuing, and it is impossible, as before stated, to ascertain what the damage will be in the future. Nor does this act of these defendants come within the provision of the State Constitution which secures to each citizen the right to freely speak, write, and publish his sentiments on all subjects. The defendants can freely speak, write, and publish their sentiments as to Mrs. Schuyler without exhibiting her statue to the public.

It seems to me clear, therefore, that applying well-settled principles of equity,

in full for the kind of work mentioned in the original contract, at the contract prices, and for the additional work at the agreed prices.

On May 16, 1872, the legislature passed an act, chapter 740 of the laws of that year, entitled "An act in relation to completing certain work in Black Rock harbor and at Lower Black Rock, Buffalo."

The complaint in this action was sworn to November 2, 1872. The suit was commenced November fourth.

On November 7, 1872, Lord applied to the canal board to take action under this law, and the board laid the matter on the table to await the decision of this suit.

Further facts appear in the opinion.

Francis C. Barlow, Attorney-General, for the appellants.

Henry Smith for the respondents.

ALLEN, J. That public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public or to the injury of individual rights, cannot be questioned. A usurpation of powers may by this process be prevented in a proper case, and a waste, misapplication, or diversion of public property or trust funds be enjoined, and an alienation or renunciation of a public franchise be forbidden and restrained. To the extent that public officers and public bodies are trustees either of franchises or property for the benefit of the public, they are amenable to the jurisdiction of courts of equity in the administration of such trusts, at the suit of the people, if the people of the State at large are the *cestuis que trust*, or of the particular municipality interested, or of individuals having a special interest in the execution of the trust or in preventing the acts sought to be enjoined.

Ch. J. Ames, in *Greene v. Mumford*,¹ states the rule by which courts of equity are governed in the exercise of jurisdiction over public officers, whether acting individually or as members of a public board or body organized according to law. He says, "certainly it is not the mere fact that a public officer is attempting to exercise a void authority which induces a court of equity to restrain him; but, notwithstanding he is a public officer, that he is about, by such exercise,

the plaintiff is entitled to the judgment asked for; and that to refuse plaintiff such relief, would be to admit that a wrong which causes severe injury may be done to an individual and yet the law can afford no relief. This would be contrary to a fundamental maxim of our equity jurisprudence, as it is always in such a case that a court of equity interferes, and adapting its relief to the exigency of each case, protects the right and prevents the wrong."

Plaintiff is, therefore, entitled to judgment, with costs. (30 Abb. N. C. 376).—ED.

¹ 5 R. I. 472.

to do an act which brings the case within its peculiar jurisdiction; for example, an act in breach of trust, in derogation of a contract which ought to be specifically performed, or an act of irreparable mischief to the real estate of another." The learned judge is borne out in his statement as to this branch of equity jurisdiction, and its limitation, by the cases cited by him;¹ and it is believed that no well-considered case can be found adverse to it. There are very many in strict accord with it.²

A court of equity exercises its peculiar jurisdiction over public officers to control their action only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction. To entitle a plaintiff to prohibition, by injunction from a court of equity, either provisional or perpetual, he must not only show a clear legal and equitable right to the relief demanded, or to some part of it, and to which the injunction is essential, but also that some act is being done by the defendant, or is threatened and imminent, which will be destructive of such right, or cause material injury to him. A state of things from which the plaintiff apprehends injurious consequences to himself, but which neither actually exists nor is threatened by the defendants, nor is inevitable, is not a sufficient ground for an injunction.³ The court in that case say: "It is obviously not fit that the power of the court should be invoked in this form for every theoretical or speculative violation of one's rights." A perpetual injunction will only be decreed when at the hearing a case is established which, within the well-established rules of a court of equity, entitle the party to that form of relief.⁴

When the State as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the particular relief demanded.

¹ Attorney-General *v.* Forbes, 2 M. & C. 123; Frewin *v.* Lewis, 4 Id. 249; s. c., 9 Sim. 66.

² See Mott *v.* Pennsylvania R.R. Co., 30 Penn. St. R. 9; Darby *v.* Wright, Comptroller, etc., 3 Blatch. C. C. R. 170; Attorney-General *v.* Compton, 1 Y. & C. 417; New London *v.* Brainard, 22 Conn. 553; Bigelow *v.* Hartford Bridge Co., 14 Id. 565; Attorney-General *v.* Liverpool, 1 M. & C. 171.

³ Bigelow *v.* Hartford Bridge Company, *supra*.

⁴ Eden on Injunctions, p. 253.

This action is brought in the name of the people by their attorney-general, under the general powers confided to that officer to prosecute and defend all actions, in the event of which the people of the State are interested,¹ for a perpetual injunction to restrain the canal board from acting or proceeding under chapter 740 of the Laws of 1872, upon the ground that the act is unconstitutional and void. If the suggestion that the act is violative of the Constitution is well founded, the act is void, and proceedings under it would be without authority; and if the attorney-general has made a case from which it appears that the performance by the canal board of the duties devolved upon that body by the act will be a breach of trust, and operate as a waste or illegal application and payment of the public moneys, and that the canal board are proceeding in the performance of those duties, or threaten or intend to do so, and unless restrained they will do so, it may be conceded for all the purposes of this appeal, but without deciding that the relief demanded should be granted. If such a case has not been established the complaint should be dismissed. A necessity must exist and be shown to exist for the action of the court before it will interfere by granting the prohibitory relief. It is not enough that the canal board is a public body composed of State officers, charged with important duties affecting the public, and that they may act in hostility to the public interests under a void law, or that the attorney-general is apprehensive they may so act; if it is not made to appear that they are acting or threatening to act, that is, if a state of facts does not actually exist which calls for relief by injunction, it will not be granted.

The case, as well that made by the complaint, as that made upon the trial and upon the facts found by the court of Special Term, is defective in almost every essential particular.

i. The attorney-general, to bring the case within the established rules of equity, alleges in the complaint that the canal board threaten and intend to act forthwith under said law and to do the things there required of them, and in this respect the complaint is not defective. But the canal board, answering with the other defendants, deny this allegation, a fact overlooked by the accurate and able judge by whom this action was tried. He found the fact as alleged in the complaint, inadvertently supposing it to have been admitted by a failure to answer. He evidently regarded the fact as material, and one to be established by the plaintiffs, and without which they could not recover.

The evidence upon the trial, so far from proving the allegation of

¹ I R. S. 179, § 1.

the complaint, substantially disproves it. The proof is that the action was commenced before any proceeding was had or taken by any one under the act. The complaint was verified on the 2d day of November, 1872, and the admission upon the trial was that on the seventh day of the same month the contractor presented to the canal board his petition asking that body to take action under the law, and that upon the suggestion of the attorney-general, a member of the board, that this action was pending, and that it seemed best to him to wait for some decision in the action, all action was suspended and the matter laid upon the table. So far as appears, there was no unwillingness on the part of any member of the board to adopt and act upon any advice or opinion the law officer of the State should give as to the validity of the law; certainly there was nothing evidencing an intent to proceed under the law, and act against his remonstrance or advice, and no declaration or threat of such action. The material fact, then, was not proved, and the fact found by the learned judge, upon a supposed admission upon the record, is entirely without evidence to support it. If that allegation is stricken out of the complaint, as it must be for all the purposes of this appeal, it is merely a statement in substance that the legislature have enacted a law which, in the opinion of the attorney-general, is obnoxious to some of the provisions of the State Constitution, and under color of which he is apprehensive that a public body, of which he is a member, may at some time proceed and take action in a manner prejudicial to the interests of the State. The courts cannot be called upon to pass upon the validity of a law, upon the mere suggestion that it is void, and that possible action may be had under it, and in advance of any proceedings had or threatened by the officials, who, if the law were valid, would be called upon or authorized to act. The appeal presents simply in this view a theoretical or speculative question, which, whatever its merits, can only be judicially decided when facts arise giving the court jurisdiction, and making a decision necessary, and giving it practical effect when made.

2. Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable results of the action sought to be restrained. The allegation of the complaint is that the doing the said acts by the defendants "will produce injury to the plaintiffs and tend to render the judgment herein ineffectual"; and the court at Special Term found the fact in the words of the complaint, without proof other than that furnished by the terms of the law itself.

The relief demanded is that the act be declared unconstitutional and void, and all proceedings under it be perpetually enjoined. In

other words, a perpetual injunction is the relief demanded. In what way or to what extent the people of the State could or would be injured, what trusts would be violated, what funds or moneys wrongfully appropriated by the action of the canal board, is not stated. The averment was a conclusion of the pleader from some facts not stated in the complaint, and which should have been stated unless some injury to the public property or franchises would necessarily result from a proceeding by the canal board. That no injury necessarily results from the action of the canal board is very evident; and it is equally apparent that no injury can possibly result to the State from the action of that body alone, without the concurrence of other facts not averred or proved, and without the action of other officials who it cannot be assumed will do any act affecting the funds of the State, except as authorized by a law constitutionally valid.

1. The canal board are merely to ascertain whether the actual cost of certain work exceeded the price paid for it, and if so, determine the amount and allow the actual cost thereof. Their duty ends with certifying the results of the examination and inquiry; and whatever may be the results, the determination does not necessarily affect the treasury or the public funds. They cannot by their act direct or procure the payment of any money. They are in no sense the custodian of the public funds or trustees of the public moneys or credit. Before any harm can come to the treasury or injury to the people, the canal commissioner must make his draft upon the auditor of the canal department for any amount the canal board shall allow the contractor, and the latter official must draw his warrant upon the treasurer, who must pay the same; and it is by the last act only that the treasury can be depleted under color of this law. It cannot be presumed, in support of the plaintiffs' claim to relief, that the three officers, each acting independently of the other, whose acts must combine to effect the payment of any money under the act, will assume to act without authority of law, or in obedience to a law void and as no law.

2. If the canal board, upon investigation and inquiry under the act, should determine that the actual cost of the work did not exceed the prices paid and allowed, no harm could come to the State. It is not averred that the cost did exceed the prices paid, or that the canal board threaten and intend to certify and allow any sum whatever to the contractor, as the difference between the actual cost, and the prices paid for the work, or that such allowance is even possible or is apprehended by the attorney-general.

No court can assume, in aid of the averment of injury, that any of these facts exist, or that any result adverse to the State will

follow the doing by the canal board of the acts required of them by the act.

3. No moneys can be drawn from the treasury except in pursuance of an appropriation by law ; and every act making an appropriation must distinctly specify the sum appropriated and the object to which it is to be applied.¹ The act under consideration makes no appropriation of moneys ; and it is nowhere averred or shown that there is any appropriation of moneys applicable to the payment of any amount which may be certified and allowed by the canal board. We cannot assume, and the court below could not assume, that there was such an appropriation. Future appropriations are in the discretion of the legislature ; but it cannot be presumed that they will appropriate public moneys in violation of the Constitution ; and should they do so, the appropriation would be void. Courts will not and cannot restrain the legislature either directly or indirectly, and an injunction based upon the assumption that the legislature may, by an appropriation of the public moneys, give effect to an unauthorized or illegal act of a public body, is without precedent, and would be absurd.

The act of the contractor in presenting the petition for an examination and inquiry by the canal board, does not give color to the action ; it is of no significance or importance, as no rights accrue or consequences flow from it ; and courts will not restrain and prohibit a citizen from petitioning the legislature, or any public body, or asking action by either in his behalf, whether with or without the authority of law, unless to do so would be a violation of some covenant or agreement with others.²

Having come to the conclusion that the attorney-general has not made a case for the relief demanded, or for any relief—assuming that he is correct in his claim that the law is unconstitutional—it is unnecessary to examine the objections alleged against the act ; although it is believed that the law is valid within the principles of *People v. Dayton*, now decided, and the reasoning of Judge Andrews in the prevailing opinion in that case.

The order of the General Term granting a new trial must be affirmed, and judgment absolute for the defendants, pursuant to the stipulation of the attorney-general.

All concur. GROVER, J., in result.

Order affirmed, and judgment accordingly.

¹ Const., Articles 7 and 8.

² Stockton & Hartlepool Railway Company *v.* Leeds, etc., Railway Co., 2 Phillips 666.

EDWARD W. DAVIS ET AL., APPELLANTS, *v.* AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 3, 1878.

[*Reported in 75 New York Reports 362.*]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city of New York, affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are set forth sufficiently in the opinion.

A. J. Vanderpoel, for appellants.

Elbridge T. Gerry, for respondents.

EARL, J. The plaintiffs allege in their complaint that in January, 1873, they were engaged extensively in the business of slaughtering hogs in the city of New York; and they describe the manner in which they conducted their business, claiming that they slaughtered the hogs by the most approved, expeditious, humane, and painless methods; and they allege that the defendant Bergh, the president of the defendant, The American Society for the Prevention of Cruelty to Animals, came to their place of business, and announced to them and their employees that they must discontinue slaughtering hogs by the methods then used, and thereupon arrested the plaintiff Crane and one of such employees for alleged cruelty to animals, and threatened that he would return in one week, and if he then found the plaintiffs or others carrying on said business in the same way, he would arrest all persons engaged in it and stop the business, as often as he found plaintiffs conducting it in that way. They then allege the extent and character of their business and facts showing that if Bergh should carry his threat into execution they would suffer great damage, for which no adequate remedy could be had in actions at law, a multiplicity of which would have to be instituted at great expense. They further allege that they are informed and believe that Bergh claims to have authority to interfere with and stop plaintiffs' business, under pretence of cruelty to the hogs slaughtered, and that they are apprehensive that unless restrained he will endeavor to carry his "threats into execution, and will continually interfere with and arrest plaintiffs and their employees, and stop said business so long as plaintiffs carry it on in the manner aforesaid"; and they pray judgment perpetually restraining the defendants and their agents "from

interfering with plaintiffs in their business in any way or manner whatever, and from interfering with their agents and employees while engaged "in such business. They do not allege that there is no valid law under which the defendants can act to prevent cruelty to animals, or that the defendants are not authorized to prevent such cruelty; but the claim put forth is that the plaintiffs do not practice any cruelty to the hogs; and they thus tender an issue of fact as to their guilt or innocence of the crime alleged against them.

The defendants, in their answer, take issue with the plaintiffs, and allege, among other things, that the methods adopted by plaintiffs for slaughtering the hogs are cruel and are attended with needless torture and torment; and that Bergh went upon plaintiffs' premises, at the time mentioned, as an officer of the Society for the Prevention of Cruelty to Animals, without any malice toward plaintiffs, and for the sole purpose of enforcing the laws of the State enacted to prevent such cruelty.

Upon the trial, the plaintiffs gave very positive evidence tending to show that they did not practice needless cruelty upon the hogs slaughtered, and also to show the allegations in their complaint as to the manner in which they would be greatly damaged by the threatened interference of the defendants. They also proved that the defendant Bergh came to their premises, as alleged, and announced that they must cease to slaughter the hogs in the manner then in use, and that he should return in a week, and if he found them slaughtering the hogs in the same way, he would arrest every man engaged. He made no threats to break up or stop their business,—but simply that he would make the arrests.

The defendants proved that Bergh was president and chief executive officer of the Society for the Prevention of Cruelty to Animals: and that he held an appointment from the sheriff of the city and county of New York, by virtue of the following instrument, signed by the sheriff, and dated January 10, 1871: "I, Matthew T. Brennan, sheriff of the city and county of New York, do hereby depute, authorize, and appoint Henry Bergh a special deputy sheriff to assist in preserving the public peace, and to make arrests pursuant to section eight of an act entitled 'an act for the more effectual prevention of cruelty to animals,' passed April 12, 1867." They also proved that Bergh, having, as such president, received complaints as to the mode in which plaintiffs conducted their business, went upon their premises, and believing that they were violating the laws by their cruelty to the hogs, made the threats of arrest as proved by the plaintiffs.

I am of opinion that the case made by the pleadings and proofs is not one of equitable cognizance.

By chapter 469 of the Laws of 1866, the defendant, the American Society for the Prevention of Cruelty to Animals, was incorporated. The purpose of the corporation was to enforce the laws enacted to prevent cruelty to animals. It is provided in the act that the corporation, among other officers, shall have a president and such other officers as shall from time to time seem necessary to the society.

We have had in this State, for many years, statutes for the protection of animals against cruelty. They have from time to time been amended and their scope extended, until in 1867, by chapter 375 of the laws of that year, a more comprehensive act was passed. By section one of that act it is provided, among other things, that if any person shall torture or torment, or unnecessarily or cruelly mutilate, or cause or procure to be tortured or tormented any living creature, he shall, for every such offense, be guilty of a misdemeanor. Section eight provides that "any agent of the American Society for the Prevention of Cruelty to Animals, upon being designated thereto by the sheriff of any county in this State, may, within such county, make arrests and bring before any court or magistrate thereof, having jurisdiction, offenders found violating the provisions of this act." It was under this section that Bergh received his appointment from the sheriff. He was the president and chief executive officer of the society, and hence one of the persons who could be appointed by the sheriff. The appointment was sufficient to authorize him to act under it until it was revoked. The statute does not require a special appointment for each arrest. When an agent has once been designated, he is clothed with authority to execute the law, by the arrest of all offenders found violating it; and this he can do without first obtaining a warrant for the arrest from a magistrate. The law contemplates the arrest of offenders while engaged in inflicting the cruelty—in the language of the law "found violating the provisions of this act." The purpose is to prevent cruelty; and this humane purpose would in large measure be defeated, if the agent of the society was required first to obtain a designation from a sheriff, and then a warrant from a magistrate. The statute furnishes the warrant. It is true that a warrant may first be obtained; and if it is, the person executing it will be protected like any other officer, whether the person arrested shall be proven to be guilty or innocent. But if the statute alone be relied upon as the warrant, then the person making the arrest can have protection only by establishing that the person arrested was found violating the law.¹ Provisions for the arrest of offenders without warrant are found in

¹ *Farrell v. Warren*, 3 Wend. 253; *Burns v. Erben*, 40 N. Y. 463; *Butolph v. Blust*, 5 Lans. 84.

other statutes, notably in sections 16 and 17 of chapter 628 of the Laws of 1857, the "act to suppress intemperance, and regulate the sale of intoxicating liquors." The authority to make arrests, found in section 17, is conferred in nearly the same language used in the statute under consideration; thus: "It shall be the duty of every such officer, whenever he shall find any person intoxicated in any public place, to apprehend," etc.

Hence it cannot be disputed that Bergh was acting under a valid law and regular authority, and that he had the right to make the threatened arrests, if the plaintiffs were actually engaged in violating the law to prevent cruelty to animals. The only question for contestation was whether, as matter of fact, they were guilty or innocent of such violation; and the determination of that question could not, by such an action as this, be drawn to a court of equity. Whether a person accused of a crime be guilty or innocent, is to be determined in a common-law court by a jury; and the people, as well as the accused, have the right to have it thus determined. If this action could be maintained in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy house, or for violating the excise laws, or even for the crime of murder, upon the allegation of his innocence of the crime charged, and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria*, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risks of such damage by being a member of an organized society and his compensation for such risks may be found in the general welfare which society is organized to promote.

This action is absolutely without sanction in precedents or principles of equity. It is impossible, in a general way, to define the cases in which courts of equity will intervene by injunction to prevent irreparable mischief. They will sometimes enjoin public officers, who are attempting to act illegally or without competent authority, to the injury of the public or individuals. As was said by Allen, J., in *The People v. Canal Board*:¹ "That public bodies and public officers may be restrained by injunction from proceeding in violation of

law, to the prejudice of the public or to the injury of individual rights, cannot be questioned." But the case contemplated by that learned judge was not one like this, where a public officer, acting in good faith, under competent authority, was threatening to arrest persons accused of crime, for the purpose of taking them before the proper tribunal for trial upon the question of their guilt or innocence. The administration of the criminal law would be greatly paralyzed, if no criminal could be arrested until it could be infallibly ascertained that he was guilty of the offense charged. The case nearest in point for the plaintiffs is that of *Wood v. The City of Brooklyn*.¹ It is but a Special Term decision, and yet it is by an able judge; and I will refer to it only to point out more clearly a distinction which I make. There an injunction was granted to prevent the enforcement of a void ordinance of the city of Brooklyn. Without determining whether that case was properly decided, it is widely different from this. If here, the law, under which Bergh was acting, had been wholly void, or if he had been wholly without authority to act under the law, then this case would have been analogous to that. But that case would have been widely different, and certainly have required a different determination, if the ordinance had been valid, and the sole question had been whether or not the plaintiff was guilty of its violation. It is therefore unnecessary to determine, in this case, whether the plaintiffs were, as matter of fact, guilty of violating the law; and for the reasons stated, the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.²

¹ 14 Barb. 425.

² The complaint alleges that the plaintiffs only perform the work on Sunday that is necessary to prevent the chilling of the furnace, and that the defendants threaten to interfere therewith. And this allegation is not denied by defendants. It is therefore established. In a recent case where a threat was alleged and denied this court held that there was no ground for injunction (*Reiff v. Western Union Tel. Co.*). In the case of *Clark v. N. Y. Life Ins. and Trust Co.* (64 N. Y. 33), the defendants threatened to build on the corner of Twenty-first street and Broadway to the line of the street. No overt act had been committed. The intention was not denied. The court held it had jurisdiction to interfere by injunction.

The only question raised by the corporation counsel in this case is the power of this court to enjoin the defendants. He contends that the proper course for plaintiff is to submit to the arrest of its servants, defend them before a magistrate, and if convicted, sue out a writ of *habeas corpus*; and he further contends that this court has no jurisdiction. If this court has no equity jurisdiction in this case and this injunction is consequently denied, the presumption is that the defendants will execute their threats. Let us contemplate a possible result in

CHAPTER II.

BILLS OF PEACE.

HOW *v.* TENANTS OF BROMSGROVE.

IN CHANCERY, BEFORE LORD NOTTINGHAM, C., MICHAELMAS TERM, 1681.

[*Reported in 1 Vernon 22.*]

THERE having been two issues directed, the one, whether How, the lord of the manor of Bromsgrove, had a grant of *free warren*; and the other, in case he had a grant of *free warren*, whether there were sufficient common left for the tenants. Upon motion for a new

that event. The men are arrested and held by the magistrate, on *habeas corpus* the prisoners are remanded, on review the convictions are affirmed, and on writ of error to the Court of Appeals they are reversed. In the meantime the furnace has chilled, that is, the molten mass, for want of fuel, has become solidified so that the iron, the flux, the fire-brick are all bound together in one indivisible mass. This is a matter so serious that it cost \$10,000 to remedy. But this is not all: the furnaces have to stand idle during the pending of the appeal the skilled labor employed has been scattered, and the contracts unfulfilled that have been previously made, and for which heavy damages have been incurred. In a word, the plaintiff has been ruined. For all this it has no redress. The defendants as public officers acting under the law assume no responsibility for their conduct. And yet the courts cannot interfere, is the assertion of the learned corporation counsel. If this is true, it is a blot upon the administration of justice. If it is true, however, the courts must so declare, and leave the redress to the legislature.

Has this court then no power to avert this possible loss?

As establishing the negative, the case of *Davis v. American Society for the Prevention of Cruelty to Animals* (75 N. Y. 362) is cited. There the Court of Appeals held that an injunction could not be sustained to restrain an officer of that society from making a threatened arrest. The facts show that plaintiffs conducted their business in a manner violative of the law against cruelty to animals, and they wished an indulgence therein from the court, which was denied. The case of *Birch v. Cavanaugh* (12 Abb. Pr. N. S. 410) also held, that an injunction would not lie merely to restrain an illegal arrest, and this on the ground that such an arrest "is not of such an irremediable nature that it cannot

trial, the Lord Chancellor said, these matters were properly triable at common law; and he did not see, what jurisdiction the chancery had of this cause: but it was urged, the bill was brought to prevent multiplicity of suits, and was in its nature a bill of peace; and a new trial was granted, upon payment of full costs.

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MAYOR OF YORK *v.* PILKINGTON AND OTHERS.

IN CHANCERY, BEFORE LORD HARDWICKE, C., DECEMBER 5, 1737.

[*Reported in 1 Atkyns 282.*]

A BILL was brought in this court, to quiet the plaintiffs in a right of fishery in the river Ouse, of which they claimed the sole fishery for a large tract, against the defendants, who, as it was suggested by the bill, claimed several rights, either as lords of manors, or occupiers of the adjacent lands, and also for a discovery and account of the fish they had taken.

The defendants demurred to the bill, as being a matter cognizable only at law.

LORD CHANCELLOR. Such a bill against so many several trespassers is improper before a trial at law; a bill may be brought against tenants by a lord of a manor for encroachments, etc., or by tenants against a lord of a manor as a disturber, to be quieted in the enjoyment of their common; and as in these cases there is one general right to be established against all, it is a proper bill, nor is it necessary all the commoners should be parties; so likewise a bill may be

be compensated in damages." This case was followed in the case of *Murphy v. Board of Police* (*Daily Register*, March 27, 1882), where the court held it would not restrain the police from interfering with a species of gambling known as book-making, for such acts were in violation of the statute of 1877, and that persons committing such acts were guilty of a misdemeanor.

These cases are clearly distinguishable from the case at bar. They are all against the person. Injunction never lies to restrain the public authorities from arrests for crimes charged against persons, as is shown by the last two cases above cited, nor does it lie against the method of doing a particular business as in the case first above cited. Here, however, the proposed action of the police is against the prosecution of this business, no matter in what form it may be done. If the officers of the society in the Davis case had attempted to prevent the plaintiffs slaughtering hogs altogether, a different question would have been presented.—*ARNOUX, J.*, *Manhattan Iron Works v. French*, 12 Abb. N. C. 446, 449-451.—ED.

brought by a parson for tithes against parishioners or by parishioners to establish a *modus*, for there is a general right and privity between them, and consequently it is proper to institute a suit of this kind.

There is no privity at all in the case, but so many distinct trespassers in this separate fishery; besides the defendants may claim a right of a different nature, some by prescription, others by particular grants, and an injunction here would not quiet the possession, for other persons, not parties to this bill, may likewise claim a right of fishing.

It is more necessary too in this case, there should be a trial at law, for it does not clearly appear, whether there is a right even in the plaintiffs, and if it should eventually come out that the corporation of York are lords of this fishery, then would be the proper time to have an injunction to prevent their being disturbed in their possession. His Lordship therefore allowed the demurrer.

This demurrer was set down to be re-argued on the 13th of March, 1737, when, in support of it, it was urged, that though it is charged in the bill, that this bill is to prevent multiplicity of suits, yet that was never allowed in this court, where the defendants have all different titles, and depend upon various matters and rights, and is not like the case of lords and tenants, or parsons and parishioners, not properly under the rule of bills of peace, for no other party who has a title or right of the same nature, could be bound by this bill: the plaintiffs say, they have a prescriptive right, this being a public royal river; the defendants, being lords of manors, may have the same right, or for the same reason they cannot prescribe for that, unless for some consideration paid.

Mr. Attorney-General *e contra*. The defendants never attempted to set up this exclusive privilege till now, but have always applied for leave to the plaintiffs; the defendants are owners of lands and lords of manors adjoining to this river, and it may properly be determined, whether the plaintiffs have that sole and separate right of fishery, and that is incumbent on the plaintiffs to prove; such bills have been brought by the city of London for some certain duties, and though a great many particular rights have been insisted on, yet a general issue has been directed to try the right. In the case of —— *v.* Carter, 1734, a bill was brought by the lord of the manor of Stepney, for six-pence on every load of hay carried to Whitechapel, though the lord, house-keepers, and scavengers claimed each some right in the six-pence, yet one general issue was directed by Lord Talbot to try that question, and the demurrer in that case was overruled.

LORD CHANCELLOR. When this case was first argued, I was of opinion to allow the demurrer, but I have now changed my opinion.

Here are two causes of demurrer, one assigned originally, and one

now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, because they ought to be considered as distinct trespassers, and that there is no general right that can be established against them, nor any privity between the plaintiffs and them.

In this respect it does differ from cases that have been cited of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the court : such are bills for duties, as in the case of the City of London *v.* Perkins¹ in the House of Lords, where the city of London brought only a few persons before the court, who dealt in those things whereof the duty was claimed, to establish a right to it, and yet all the king's subjects may be concerned in this right ; but because a great number of actions may be brought, the court suffers such bills, though the defendants might make distinct defenses, and though there was no privity between them and the city.

I think therefore this bill is proper, and the more so, because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defenses ; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants ; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights.

Another cause of demurrer is, that the plaintiffs have not established their title at law, and have therefore brought their bill improperly to be quieted in possession. Now it is a general rule, that a man shall not come in to a court of equity to establish a legal right, unless he has tried his title at law, if he can ; but this is not so general an objection as always to prevail, for there have been variety of cases both ways.

There are two cases reported together in Prec. in Eq. 530 : Bush *v.* Western, and the Duke of Dorset *v.* Serjeant Girdler ; in the former it was held, that a man who has been in possession of a watercourse sixty years, may bring a bill to be quieted in his possession, although he had not established his right at law ; in the latter, that a man who is in possession of a fishery, may bring a bill to examine his wit-

¹ 4 Bro. Par. Ca. 158.

nesses *in perpetuum rei memoriam*, and establish his right, though he has not recovered in affirmance of it at law; otherwise, if he is interrupted and dispossessed, for then he had his remedy at law.

In the present case the demurrer was overruled.

DILLY v. DOIG.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., NOVEMBER
19, 1794.

[*Reported in 2 Vesey, Jr., 486.*]

THE plaintiff was proprietor of an improved edition of Entick's Dictionary; and had obtained an injunction to restrain the defendant from selling a spurious edition printed at Edinburgh.

Mr. Thompson moved upon notice for leave to amend the bill by making another bookseller, who had procured several copies of the spurious edition from Edinburgh with a view to sale, a party without prejudice to the injunction. He said, the bill only sought to establish one general right; and cited *Mayor of York v. Pilkington*.¹

LORD CHANCELLOR. The mode proposed would be more inconvenient than separate bills. The right against the different booksellers is not joint, but perfectly distinct: there is no privity. If the defendant, against whom you had got the injunction, had transferred his books to another, I would have followed it. In the case cited the bill was to prevent multiplicity of suits: one general right was liable to invasion by all the world: so a bill to establish the custom of a mill: they stand upon a distinct ground. I do not remember any case upon patent rights, in which a number of people have been brought before the court as parties, acting all separately upon distinct grounds: it has always been against a particular defendant. In a case here not long ago upon Bolton and Watts's patent there were several bills.

The motion was refused.

¹ 1 Atk. 282.

✓ NEW YORK AND NEW HAVEN RAILROAD COMPANY *v.* ROBERT SCHUYLER, WILLIAM CROSS, AND 324 OTHERS.

IN THE COURT OF APPEALS OF NEW YORK, JUNE TERM 1858.

[*Reported in 17 New York Reports 592.*]

APPEAL from the Supreme Court. The complaint was filed in January, 1855. Three hundred and twenty-six persons are joined as defendants. One of them, William Cross, demurred to the complaint upon several grounds, which, so far as material, appear from the opinion which follows this statement.

The facts set forth in the complaint are as follows:

The plaintiff is a corporation, owning and operating a railroad extending from New Haven to New York. The capital authorized by the charter is limited to \$3,000,000, represented by thirty thousand shares of stock, all of the shares except seventy-eight having been issued, and the capital paid in, less about \$700 on the seventy-eight shares, several years since. Transfer books of the stock were kept at the city of New York and two other places, where transfers of the stock were made and certificates issued as occasion required. From the organization of the company, in 1846, to the 3d of July, 1854, Robert Schuyler was the president and transfer agent of the company, having his station and place of business at the office of the company in New York. As early as October, 1853, he commenced a series of fraudulent acts, extending over the whole period of time intermediate that date and the 3d of July, 1854, during which time, unknown to the plaintiff, he issued and disposed of a large number of certificates of stock of the company, which on their face purported to be genuine, were executed and signed in the same manner as genuine certificates, and undistinguishable from them, but which in fact were fraudulent overissues for his own private purposes. Some of these he issued to a firm of which he was a member ; the others were issued to divers other persons.

In other instances, after making transfers of stock for other parties on the books of the company, he failed to cancel the old certificates which were surrendered for that purpose, but fraudulently reissued them as genuine certificates of stock owned by himself.

In furtherance of his designs, he allowed clerks of his firm to give the firm and himself a false credit on the stock ledger of the railroad company, by which it was made ostensibly to appear that such firm and himself had stock to their credit on the books of the company to the amount of \$1,000,000, when in truth it owned none.

These false certificates purporting to be genuine, and those originally genuine certificates which instead of being cancelled were re-

issued, were used by Robert Schuyler in his own, and in the business of his firm, under representations that they were genuine, chiefly for the purpose of borrowing money ; were sold openly in the market as genuine stock in some instances, and have passed in this way into the hands of the defendants, the present holders.

In some instances, this overissued stock has become commingled with genuine, by having, in the regular course of business, been transferred and incorporated into a certificate with the genuine.

The whole false issue amounts to near \$2,000,000.

Nine thousand three hundred and eighty-three shares now stand on the books of the railroad company, in the names of twenty-nine persons and firms to whom it had been transferred by the firm to which Schuyler belonged. The balance of such overissues has gone to the hands of two hundred and sixty-six other persons and firms at different times, in different amounts, from different persons ; and many of these holders are also the holders of genuine stock.

Intermediate the 29th of June and the 3d of July, 1854, Schuyler, the president and transfer agent of the company, being sick, Mr. Worthen, the vice-president, who was also one of the directors, undertook, but, as the plaintiff says, without authority, to act as transfer agent in the place of Schuyler, and, unaware of Schuyler's frauds, transferred four thousand four hundred and forty-six shares of that false stock for twenty-one different persons and firms, supposing the certificates he received and transferred to be genuine.

Some of the holders of this overissue, as the complaint alleges, took, knowing the certificates were fictitious ; some with reason to believe so ; some on usurious contracts ; many under circumstances which should have put them on inquiry, and many others under circumstances and upon considerations unknown to the plaintiffs.

They all claim rights against the company ; some that they are stockholders ; others that they are either stockholders or have a right of action against the company for their losses. Some claim damages to the full nominal par value of the certificates they hold ; others for the money they have actually advanced ; while all assert a claim upon the company in some form. It is not averred that some of these fraudulently issued certificates have not gone into the hands of entirely innocent parties, for value.

Several of the defendants have sued the company. Some suits are pending in the Supreme Court ; some in the Superior Court, and others in the Common Pleas of New York City. Other suits are threatened. The complaint joins, in this suit, Robert Schuyler and all the alleged owners or holders of this overissued stock, and prays that the certificates may be decreed illegal and void, and be sur-

rendered up and cancelled ; that until these questions are all settled, those who have sued be stayed in their proceedings ; that those who have not, be enjoined from suing ; that the suits now pending be consolidated with this, and closes with the usual general prayer for such further or other relief as is meet and proper.

The defendant, Cross, had judgment at special term, allowing the demurrer and dismissing the complaint as to him. Upon appeal the Supreme Court, at general term in the first district, affirmed this judgment, and the plaintiff appealed to this court.

William C. Noyes for the appellant.

Francis B. Cutting for the respondent.

COMSTOCK, J. This case is somewhat special and extraordinary in its circumstances, and must be determined upon principles of reason and justice, with the aid of such analogies as the law will afford.

It is well settled that the directors or managers of a corporation are trustees for the holders of its stock. It is on this ground that the shareholders are entitled to relief in equity against an actual or threatened waste or misapplication of its corporate funds. It seems also to be settled that a suit for that purpose must be brought in the name of the corporation, unless it appears that the directors refuse to prosecute, or are themselves the guilty parties answerable for the wrong. If they do thus refuse, or are thus answerable, the shareholders may sue in their own names ; but in such a case, the corporation must be made a defendant, either solely or jointly, with the directors sought to be charged.¹ I have nowhere seen it laid down that the corporation itself, considered as a pure legal abstraction, is a trustee for its stockholders ; yet it is not difficult to see that certain trust relations exist between it and them. A corporation aggregate is clothed with a legal title to its real and personal estate, franchises, and privileges, while the shareholders, as individuals, have in them equitable interests ; the interest of each being in proportion to the amount of stock which he holds. The corporation is entitled to receive, and does receive, the gross amount of the earnings ; upon a trust, however, or at least under a duty, to pay over to the stockholders the net profits, as dividends upon their stock. If not under all circumstances bound to make and pay over in money the dividends earned, it must, at all events, use them for the shareholders' benefit, in the prosecution of its legitimate enterprises, and subject to ultimate accountability. If these relations are not precisely defined in the books, it is because the occasion has not arisen requiring this to be done.

The New York and New Haven Railroad Company is a corporation aggregate, invested by its charter with certain privileges and

¹ *Robinson v. Smith*, 3 Paige 222, and cases there cited.

powers, and with a legal title to all the real and personal estate acquired in the construction and operation of its road. Its genuine and undoubted stock amounts to \$3,000,000, and by its charter cannot exceed that amount. All this stock, with an exception of no importance to the question before us, has been paid for, and is held by shareholders whose rights as such are not called in question. But, in addition to the \$3,000,000 of undoubted stock, Mr. Schuyler, the president of the company, issued at different times, for his own private purposes, fraudulent and spurious certificates of stock, to the amount of nearly \$2,000,000, which are now held by the numerous parties against whom this suit has been instituted. The president was the duly authorized agent to superintend the transfer of stock from any existing shareholder to another party, with authority in all cases to issue a new certificate, upon a transfer of the stock it represented being duly made in the books, and upon a surrender of the old one. The spurious certificates before mentioned were not based upon any transfer of genuine stock, nor did they represent stock in any sense whatever. In their appearance, however, they were genuine, and duly authorized. In form they were like those which represented the real stock of the company, and they were signed by a person who was known to have authority to sign under the conditions above named. Thus they obtained more or less currency throughout the community, being taken by various parties without attending to the forms and conditions prescribed by the charter and by-laws of the company, regulating the transfer of stock.

This extraordinary fraud could not fail to place the corporation in a situation of extreme difficulty and embarrassment. What was to be done with the spurious stock certificates? Were the holders to be recognized? Were they to share in the dividends, and were they entitled to vote at elections? Was the stock of the company practically increased to \$5,000,000, when the charter confined it to \$3,000,000? If this could not be done, then was the company bound to pay, in damages to each holder of these false instruments, the value which the genuine stock had borne in the market? These were grave questions, about which gentlemen of great eminence in their profession, and the courts also, differed. In the courts of original jurisdiction, it was determined, after the institution of this suit, that the corporation was, in some form, bound to make good the false certificates. On appeal to this court, we held them void to all intents and purposes, and that the corporation and its genuine stockholders were entirely unaffected by them.¹

¹ Mechanics' Bank *v.* The New York and New Haven Railroad Company, 3 Kern. 599.

Such was the situation of this company on the discovery of these acts of Mr. Schuyler. As a pure creation of law, the corporation was not a sentient being ; but the law, nevertheless, clothed it with authority which enabled it to act, by its board of directors, as a natural person, within the sphere of its powers and duties. It had therefore the rights which a natural person would have in analogous situations; and in order to evolve the principle of this controversy, we may suppose that a natural person is clothed with the legal title to, and is in possession of, an extensive line of railroad, receiving the gross earnings for the purpose of dividing the net profits amongst a large class of individuals, whose right, in certain fixed proportions, is evidenced by a certificate or declaration of trust, which each one holds, signed by the legal owner or his authorized agent. If, then, a new class of individuals should come forward claiming the same rights, and presenting, as the evidence thereof, instruments of the same kind in all respects, bearing on their face all the appearances of genuineness and authority, but in fact unauthorized and spurious, what would be the rights and the duty of the legal owner in that exigency ? Upon the settled principles of equity, it would be his right and his duty to call the false claimants into court in order to remove the cloud upon the equitable interests of those whom he represented. It would be his right, as owner of the legal estate, to bring to a determination every claim upon that estate, in law or equity, resting upon facts and documents giving to it, *prima facie*, all the appearances of genuineness and validity. It would be his duty to call for such a determination, as the representative of numerous equitable interests carved out of his estate and placed under his protection. These are principles so familiar and elementary that citations from the books are not required to support them.

With the aid of these analogies, we can come to a conclusion as to the rights of this corporation in the exigency which had arisen at the commencement of this suit. It stood, as we have seen, in a *quasi* trust relation to its shareholders, holding, as it did, the legal estate, and they having, as individuals, an equitable right in the net earnings or income of the same estate. They also had the right to vote at the elections of the company, to the exclusion of all other persons. If the corporation yielded these rights to the holders of its original and genuine stock, and rejected the claims of those who held the false certificates, it became at once exposed, not merely to one, but to a multiplicity of suits, involving, as we have seen, questions of no inconsiderable difficulty. In these circumstances, its right of resort to a court of equity, in order to have the spurious certificates cancelled and annulled, does not admit of a doubt, provided those instruments

were such, in character and appearance, as to bring them within the principles on which courts of equity administer protective and preventive justice. There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defense at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. But the jurisdiction does not universally attach on the mere ground that the deed or other contract is invalid. If the invalidity plainly appears on the face of the writing, so that no lapse of time or change of circumstances can weaken the means of defense, it is held that no occasion arises for a suit in equity to decree its cancellation. And the doctrine now is, that such instruments do not, in a just sense, even cast a cloud upon the title or interest, or diminish the security of the party against whom the attempt may be made to use them. If, on the other hand, the invalidity does not appear on their face, the jurisdiction is not confined to instruments of any particular kind or class. Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon title or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be cancelled. These principles of general jurisprudence are believed to be decisive in favor of the right of this corporation to demand the cancellation of the false stock and to maintain a suit in equity for that purpose. On their face, as we have seen, the certificates of this stock are undistinguishable from those which are genuine and true. They confer, therefore, upon each holder a *prima facie* right as a stockholder. The evidence of such right must in every case be repelled by showing that the certificate does not represent the actual stock of the company, and it is impossible to say that the means of repelling these claims will always be as perfect as they were when the frauds in which they originated were first discovered.

It is true, we held in the case already mentioned, that the company could successfully defend an action brought against it for refusing to recognize one of these certificates ; but the defense rested, as it must if actions were to be brought upon every other certificate, upon the extrinsic facts to be proved. Conceding, even, that every one of these claims may be defended, at whatever distance of time and under whatever circumstances they may be pressed upon the corporation, this by no means meets the equity of the case. If, as we have held, no just claim against the corporation arises out of these certificates, it is plainly unconscientious and inequitable that they should be kept on foot. Their very existence, outstanding, is unjust, because it must

of necessity exercise a most depressing influence upon the real stock of the corporation. We all know how sensitive are values in property of this description; and what conceivable facts could cast a deeper shadow over every genuine shareholder's interest than a spurious issue of \$2,000,000 of stock, evidenced by certificates apparently valid, and under which every holder boldly and confidently asserted his claim? The fact is not alleged in the complaint, but we can scarcely err in supposing that, on the discovery of these frauds, every share of valid stock must at once have lost nearly one-half of its market value. That depression must continue, in a greater or less degree, while the certificates are allowed to stand. A decision against one of them, in an action founded upon it, is not a determination against any other one, and cannot, while the others are outstanding, restore to the genuine stock the value which justly belongs to it. To say that the shareholders must remain in such a condition of insecurity and doubt, and must hold their shares under such a depression, would be to sanction a species of injustice which ought to be prevented. These shares of stock are a description of property as much entitled to invoke the protective remedies peculiar to courts of equity as any other.

In applying these remedies to any other kind of property thus clouded and depressed by a written instrument professing to be, and on its face actually being, an incumbrance upon it, no doubt, it seems to me, would arise; and I think there is no well-founded doubt in the present case. And, besides these considerations, which affect the interests of the individuals whose legal identity in this controversy is lost in the corporate body representing them, we are to regard also the serious embarrassment which cannot fail to attend the internal administration of the affairs of the corporation itself. When this large addition of false stock became known, under which the holders confidently claimed to be shareholders, how could the corporation intelligently and safely proceed to regulate its elections and divide its earnings? These were difficulties which nothing short of a judicial determination, against the spurious issue and cancelling the false certificates, could effectually remove.

One of the views presented on the argument in support of the complaint was, that the corporation, as a trustee of the property and funds under its control, was entitled in that character to ask the advice and direction of a court of equity in regard to its obligations and duties in the circumstances which had occurred. Without having particularly examined this theory, I very much doubt whether it can be maintained. I have already spoken of the relations between the corporate body and its shareholders as having some analogy to those

between trustees and *cestuis que trust*; but those relations are nevertheless *sui generis*, and they point to the corporation rather as the proper representative of its genuine stockholders, in a controversy of this kind, than as a trustee entitled for its own sake to ask the advice of the court as to the mode of discharging its functions. When a trustee invokes the interference of equity on such a ground, he does it for his own protection; and the interests of the beneficiary are not of themselves an element of the jurisdiction. But it is difficult to separate, even in abstract contemplation, the rights and interests of a corporation from those of the shareholders. If the corporation exceeds its powers, or misappropriates its funds, the stockholder may complain, or if the evil be only threatened, he may arrest it by injunction; but if the controversy is with third parties, the interests of the corporate body and of the individuals who compose it are so nearly identical that a separation in theory or practice would seem to be impossible.

For this reason there is a great difficulty in sustaining the present suit as one brought by a trustee to be advised and directed in regard to the proper line of duty toward the *cestuis que trust* and those who claim to stand in that relation. But the same reason unerringly indicates the corporation as the organ through which the shareholders are to be heard when legal wrongs are to be redressed or equitable remedies are to be invoked. If, therefore, I have been successful in showing that the fraudulent certificates of stock are instruments of such annoyance and vexation, in depressing values and disturbing the fair enjoyment of rights, that they ought not to be allowed to stand, then this suit by the corporation rests firmly upon that branch of equity jurisdiction which includes the cancellation of such instruments.

The views which have been taken assume the invalidity of all the certificates fraudulently issued by Schuyler. Upon the facts stated in the complaint, which the demurrer admits to be true, and upon the principles laid down in the case of the Mechanics' Bank against this company,¹ it is impossible to say that any one of them is a valid representative of stock, or a claim of any kind against the corporation. It appears, indeed, that most of the certificates have passed into the hands of third parties; and the decision of the court below assumes that those parties, in good faith, paid for or advanced value upon the shares. On that ground it was further assumed that their rights were superior to those of the corporation and the holders of its actual and genuine stock. This is a view of the question which holds a prom-

¹ *Supra.*

inent place among the reasons given for dismissing the complaint. But since the court below pronounced its judgment, the other case mentioned came before us on appeal, and the contrary doctrine was very precisely determined, and upon the fullest consideration. Adhering as we do to that decision, and looking at the case as the complaint states it, all the certificates in question must share the same fate ; and the present case will not be embarrassed by the necessity of rendering different judgments in respect to different parties. In saying this much, however, it is not designed to prejudge the rights of any person in special circumstances, to be defensively alleged and proved, differing in their character from any yet called to our attention.

The only remaining question is one of multifariousness in respect to parties or causes of action. The mere joinder of too many persons as defendants, when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of suit. A demurrer may be interposed for a defect of parties, but not for the reason merely that too many are brought in.¹ In respect to the joinder of causes of action, the provision of law, so far as material to the question, now is, that "the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of the action."² The authors of the Code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the previous law had been. This provision, as it now stands, was introduced in the amendment of 1852, because the successive Codes of 1848, 1849, and 1851, with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. This amendment, therefore, was not designed to introduce any novelty in pleading or practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity.

It is only necessary, therefore, to determine whether, in a suit instituted for the purpose of cancelling the invalid certificates of stock

¹ Code of 1852, § 144.

² Code of 1855, § 167.

in the plaintiffs' corporation, all the claims under these instruments can be united, and all the parties holding them brought in, without rendering the suit obnoxious to the charge of multifariousness, as that term has hitherto been understood. The convenience of settling the whole controversy in a single suit is obvious ; because the only alternative is, that the corporation would be entitled to institute, and must institute, a separate action against each of the numerous parties claiming under these certificates. No one of the parties would be bound by a decision against any other one ; and intolerable expense and delay might be the consequence of such a course.

The rule on this subject has been often considered, both in England and this country, and has become tolerably well settled, although in regard to some of its applications there is a diversity in the adjudged cases. In the case of the Mayor of York *v.* Pilkington,¹ decided by Lord Hardwicke in 1737, the corporation of York claimed an exclusive right of fishery in the River Ouse for a large tract ; and the bill was filed against various persons claiming several and distinct rights in the same fishery, in order to quiet the plaintiffs' title and also for a discovery and account of the fish the defendant had taken. A demurrer to the bill for multifariousness was overruled after being twice argued, the Lord Chancellor observing : "It was no objection that the defendants have separate defenses ; but the question," he added, "was whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants." Nearly a century later, Lord Eldon referred to this case as standing on the ground that "where the plaintiffs stated themselves to have an exclusive right, it signified nothing what particular rights might be set up against them, because if they prevailed the rights of no other person could stand." And he added : "It has long been settled that if any person has a common right against a great many of the king's subjects, inasmuch as he cannot contend against all of the king's subjects, a court of equity will permit him to file a bill against some of them, taking care to bring in so many persons before the court that their interests shall be such as to lead to a fair and honest support of the public interests."² In Whaley *v.* Dawson,³ Lord Redesdale considered the test to be whether there was a "general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct." In referring to the Mayor of York *v.* Pilkington, and analogous cases, he observed: "The court has gone upon the ground of preventing multiplicity of suits, one general right being claimed by the plaintiffs against all the defendants." The same eminent author-

¹ 1 Atkyns 283.

² Jac. & Walk. 369.

³ 2 Schoales & Lefroy 370.

ity, in the treatise on Equity Pleading,¹ says : "The court will not permit a plaintiff to demand by one bill several matters of *different natures* against several defendants ; but when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold."

The subject of multifariousness is very elaborately and carefully examined by Mr. Justice Story, in his treatise on Equity Pleading. Adopting the views and in part the language of Lord Cottenham, in *Campbell v. Mackay*,² he lays down the following doctrine : "The result of the principles to be extracted from the cases on this subject seems to be, that where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit."³ He adds : "Indeed, where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them." In this State, the joinder in one suit of causes of action in some sense distinct from each other, with all the necessary parties for their determination, has always been allowed with great liberality where the convenience and the ends of justice have required it. In *Brinckerhoff et al. v. Brown et al.*,⁴ it was held that different judgment creditors might unite in one bill for the purpose of reaching the estate of their common debtor, which he had fraudulently conveyed, and that the bill might be filed against persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act. In the case of *Fellows et al. v. Fellows et al.*,⁵ the bill charged that the several defendants, in combination with each other and with the debtor of the plaintiffs, took from him separate conveyances of his property, without consideration and in order to defraud the plaintiffs. One of the defendants answered, denying the combination, and demurred to the residue of the bill, because it included distinct matters in many of which he was not concerned. The demurrer was overruled, the Chancellor observing : "If instead of one matter in demand, here are three (the three conveyances in question); they are all of the same nature in respect to the questions

¹ Mitford Eq. Pl., by Jeremy, 181.

² 1 Mylne & Craig, 623, 624.

³ § 533.

⁴ 6 John. Ch. 139.

⁵ 4 Cow. 682.

they now present. Each of the three defendants holds a portion of the property of John Fellows (the debtor) by a fraud, and by a fraud of the same kind. The right of the complainants is against the whole property, and their right against all portions of it is of one nature. The claims of the three defendants, now holding the property in question, are of one character, each of them holding under a fraudulent transfer." "This, therefore, is not a case of several matters of distinct natures in the sense of the rule upon that subject." The decision was appealed from to the Court for the Correction of Errors, and was there unanimously affirmed, after a very full discussion by counsel and elaborate consideration in the opinions of several members of the court.

Many other cases might be mentioned, exhibiting varieties in the application of the general rule declared in those which have been cited. But it is unnecessary to refer to them. The rule itself is settled too firmly to be shaken, and it would seem to be decisive of the present question. In this case there is a single interest in the plaintiffs directly opposed to the interests of all the defendants. The common point and centre of the litigation is the stock, property, and franchises of the plaintiff's corporation, in which the defendants claim specific shares and proportions as holders of the false certificates. The rights claimed by the defendants are distinct, because they rest upon separate instruments as the evidence thereof; but they are of precisely the same nature, they turn upon the same question, and they are a cloud upon the same estate. Each certificate is a false muniment of the holder's title to a particular interest in the corporate estate, vested as a unit in the corporation but equitably belonging to the holder of its actual stock.

Among the grounds of the argument, in behalf of the plaintiffs, it was insisted that the suit is maintainable on the principles of a bill of peace, or suit to quiet a title and prevent a multiplicity of actions. A suit in equity to establish a sole right of fishery against several hostile claimants, or by a parish priest to establish a right to tithes against the parishioners or by the parishioners to establish a modus, are examples of a bill of this kind. It will be found, however, that there is nothing in the rules which govern the technical bill of peace to justify a misjoinder of subjects or parties in the litigation. But the number of parties and the multiplicity of actual or threatened suits will sometimes justify a resort to a court of equity when the subject is not at all of an equitable character, and there is no other element of equity jurisdiction. Even in such cases there must be such a unity of interest on one side or the other as to bring the litigation within the ordinary rules of equity pleading. This suit, I think, could be sus-

tained as a bill of peace, but the question of misjoinder would be the same. Without referring to the principles of such a bill, we sustain the jurisdiction on the ground that the controversy is of an equitable nature, for the reasons which have been given at large; and we hold that the objection for multifariousness merely is untenable within ordinary and established rules on that subject. If all the invalid certificates were now held by one person, the jurisdiction would attach in order to have them cancelled, and the suit would be against him alone. Being held by various parties, the jurisdiction still depends on the same principles; but all the parties can be united, because there is such a unity in the controversy with all of them as to render it fit and proper, according to settled principles, that they should be joined in a single suit.

The judgment of the Supreme Court must be reversed, and judgment entered overruling the demurrer, with the usual leave to answer.

SELDEN and ROOSEVELT, JJ., did not sit in the case; all the other judges concurring.

Judgment reversed, and demurrer overruled with leave to answer.



SHEFFIELD WATERWORKS *v.* YEOMANS.

IN CHANCERY, BEFORE LORD CHELMSFORD, C., NOVEMBER 8 AND 9,
1866.

[*Reported in Law Reports, 2 Chancery Appeals 8.*]

THE bill in this case was filed against John Yeomans and five defendants on behalf of themselves and all other the persons named in any of certain pretended certificates, and stated, that in March, 1864, a reservoir belonging to the Company of Proprietors of the Sheffield Waterworks, the plaintiffs in this case, burst, and occasioned an inundation, whereby many persons lost their lives, and the property of very numerous persons was damaged. That, by the Sheffield Waterworks Act, 1864, commissioners were appointed who were to inquire into the damages occasioned by the inundation, and any person claiming damages under the act was directed to lodge a statement of his claim at the office of the commissioners. Where on any claim damages were assented to by the company, or assessed by the commissioners, the costs of the claimants were to be borne and paid by the company, and the commissioners were to certify accordingly. All such costs were to be payable by the company at the expiration of six months after the making of the commissioners' general certificate, but were,

in case of difference, to be taxed and settled on production of a certificate of the commissioners by a Master of a superior court of law at Westminster. If any costs payable under the act were not paid within twenty-eight days after demand in writing, the certificate of the commissioners respecting such costs should have the effect, as against the company, of a judgment recovered for the amount of such costs. That the claimants for compensation under the act were 7,315 in number, and many of them were poor and ignorant, and employed improper persons to represent them; and the commissioners, therefore, made a regulation that no certificate should be issued except to the claimant in person. That there was a difference of opinion between the commissioners as to whether the powers of the commissioners had not expired, and 1,500 certificates, which the plaintiffs alleged to be invalid, were delivered by some of the commissioners to the defendant John Yeomans, the town clerk of Sheffield. That unless the court interfered, the defendant John Yeomans, and other persons by his permission, would produce these invalid certificates and have them taxed, whereupon judgment would be issued, and such proceedings would seriously prejudice the plaintiffs, by compelling them to defend themselves on very numerous improper taxations, occasioning them very large costs and expenses. That the question whether these certificates were valid or invalid was the same as to all of them, and that the persons named therein were too numerous to be made defendants, but were properly represented by five of them, who were named as defendants.

And the bill prayed that the defendant John Yeomans might be restrained from delivering these certificates except as the court should direct, and that the defendants and all other persons named in any of these certificates might be restrained from having them taxed, or procuring any taxation or judgment against the plaintiffs, and that all these certificates might be delivered up to be cancelled, and, if necessary, that it might be declared that the same were invalid.

To this bill the defendants, except Yeomans, demurred, and the Vice-Chancellor, Kindersley, overruled the demurrer.

The five demurring defendants appealed.

Mr. Baily, Q.C., and *Mr. Rodwell*, for the demurrer, contended that the certificates were valid, and the rights of the claimants to costs were made absolute by the act. The court of law would be able to decide the questions. *Re Wraithby.*¹

Mr. Glasse, Q.C., and *Mr. Bagshawe*, for the bill, cited Story's *Equity Jurisprudence.*²

¹ 11 Jur. (N. S.) 954.

² Vol. II. §§ 853, 854.

Mr. Lindley, for the defendant Mr. Yeomans.

Mr. Baily, in reply.

LORD CHELMSFORD, L.C. The Vice-Chancellor appears to have decided this case against the defendants on two grounds: First, that the bill was a bill of peace, and therefore proper in its form and character. Secondly, that the point raised by the demurrer depended upon questions of fact which had to be proved, and that ought therefore to be reserved for the hearing. His Honor accordingly overruled the demurrer, reserving to the defendants the benefit of it at the hearing, and reserving till the hearing the costs of the demurrer.

Perhaps, strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants for costs all depend upon the same question—the validity of certificates sealed under the circumstances stated in the bill. Each of the 1,500 persons, if he obtained the certificate from Mr. Yeomans, might produce it to a Master of one of the superior courts of common law, and obtain as a matter of course a taxation of the costs. He might then enter up judgment and sue out execution, and no application could be made in any of the common-law courts to stop the proceedings, although it may turn out in the result of this suit that the certificates are wholly invalid. It is true that, if the certificates have no validity, a motion might be made in the court where judgment was entered up, and from which the execution issued, to set aside that execution, but not until considerable expense had been incurred, and possibly after the same course of proceeding to judgment and execution had been taken by many of the claimants. It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend.

The remaining question is, whether the question ought to be decided upon demurrer. It was pressed very strongly upon me that this was always considered to be a matter entirely for the discretion of the judge, and that no case could be produced in which, when it had been determined in the court below that the question ought not to be disposed of upon demurrer, the appeal court had overruled that decision. Whether any such case can be found or not (and none has been produced), it seems to me that where a judge of great experience and judgment has arrived at the conclusion that a case ought not to be decided upon demurrer, whether on account of its importance, or by reason of facts and circumstances which he considered

necessary to be found in order satisfactorily to decide the question raised by the bill, it would not be a proper exercise of the authority of an appellate court to overrule this decision, unless it was satisfied that the whole case was open upon the demurrer. I agree, however, with the Vice-Chancellor, that the question of the validity of the certificates for costs is not capable of a satisfactory determination without the proof of facts which are not admitted by the demurrer, and I must decline to anticipate such proof by deciding the case upon the pleadings as they stand; therefore, the Vice-Chancellor's order appealed from must be affirmed, and the appeal dismissed with costs.

LEHIGH VALLEY RAILROAD COMPANY *v.* HENRY ✓
MCFARLAN AND OTHERS.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, NOVEMBER TERM, 1879.

[Reported in 31 *New Jersey Equity Reports* 730.]

On appeal from a decree of the Chancellor, reported in Lehigh Valley R.R. Co. *v.* McFarlan.¹

Mr. Thomas N. McCarter and *Mr. F. T. Frelinghuysen* for appellants.

Mr. H. C. Pitney for respondents.

DEPUE, J. The Morris Canal & Banking Company was incorporated in 1824. In 1828, it constructed its canal from the river Delaware to the Passaic. In 1871, the canal and all the franchises and property of the company were leased to the Lehigh Valley Railroad Company. The summit level of the canal is near Lake Hopatcong, which furnishes the principal supply of water for the eastern division of the canal. At Dover, in the county of Morris, the canal crosses the Rockaway river. The crossing is effected by discharging the waters of the canal into the river by means of a lift-lock, and admitting, through a guard-lock on the other side, sufficient water into the lower level to maintain the water therein at a height sufficient for the navigation thereon. To accomplish that purpose, the company placed a dam across the river. The dam, as a permanent structure, was erected when the canal was built, in 1828. In 1845, the company enlarged its canal, and increased its capacity, so as to admit the passage of boats requiring a greater depth of water; and, in order to

¹ 3 Stew. 135.

obtain a suitable depth of water at the place of crossing, and in the lower level, the company placed, on the top of the dam, flash-boards, held in position by iron pins or bolts, to be kept there, as necessity might require, during the boating season. The controversy which has given rise to this litigation, relates to the company's right to the use of these flash-boards.

McFarlan is the owner of a rolling-mill, situate on the Rockaway river, above the canal company's dam. His mill is driven by the waters of the river, which, after passing his water-wheel, are discharged into the river above the canal dam. The Hulseys and Mrs. Beach are the owners of a grist-mill, saw-mill, and forge and bloomery, situate on the Rockaway river, below the canal company's dam, which works are also driven by the waters of the river. The other defendants, Van Winkle and Hoagland, were lessees of the Halsey mills and forge.

McFarlan, conceiving himself to be injured by back-water upon the wheel of his rolling-mill, sued the complainants to recover his damages. The Hulseys and their tenants also brought suits to recover damages for the diversion of the water from the mills and forge, below the canal dam. Thereupon the complainants filed this, a bill of peace, to enjoin the prosecution of said suits, and for a determination of the rights of the parties respectively in one suit, to be prosecuted under the direction of the Court of Chancery. Upon the filing of the bill, a temporary injunction was granted.

The Hulseys demurred to the bill for multifariousness. McFarlan filed an answer, in which the objection to the bill for multifariousness is also expressly taken.

The Chancellor, upon hearing upon bill, answer, and demurrer, dissolved the injunction, and dismissed the complainant's bill.

The particulars connected with the institution of the said several suits are fully stated in the Chancellor's opinion. They need not be repeated here. Suffice it to say that, at the time this bill was filed, eight suits were being prosecuted—two by McFarlan, two by the Hulseys, and two by each of their tenants. These suits were all brought in the Supreme Court of this State. The first of them, brought by McFarlan, was commenced December 30, 1876, and claimed damages from April 1, 1872, to the commencement of the suit. The first of the Hulseys' suits was begun September 21, 1876, and, on the same day, the first of the suits of Van Winkle and Hoagland were begun. All these suits the complainant (it being a foreign corporation) removed to the Circuit Court of the United States for the district of New Jersey. Thereupon, each of the plaintiffs in the said actions brought a new suit, in the Supreme Court of this State, for

damages accruing after the time of the commencement of the first suit.

For the duplication of these actions the complainant is itself responsible. If the suits first commenced had been allowed to remain in the State courts, and fresh suits had been brought by the same parties for damages accruing subsequently, and arising from the same cause, the defendant in such actions could have obtained a consolidation of all the actions brought in the name of the same plaintiff, by application to the court, under sections 121 and 289 of the practice act.¹ And although the several suits be prosecuted in different courts, a court of law may, in virtue of its control over its own proceedings, in its discretion, order a stay of proceedings in suits pending before it, until the rights of the parties are settled by the result in one action. The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous, is, by application for the consolidation of actions, or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff.²

The question, then, will be, whether four suits pending (one by McFarlan, one by the Hulseys, one by Van Winkle, and one by Hoagland) will, under the circumstances of this case, justify resort to a bill of peace.

A bill of peace, enjoining a litigation at law, is allowable only when the complainant has already satisfactorily established his right at law, or where he claims a general and exclusive right, and the persons who controvert it are so numerous that the endeavor to establish the right by actions at law would lead to vexatious and oppressive litigation, and renders an issue under the direction of the court indispensable to embrace all the parties concerned, and to avoid multiplicity of suits.³

The object to be attained by resort to a court of equity, in such cases, is, to obtain a final determination of the particular right in controversy, as between all the parties concerned, by a single issue, instead of leaving the right open to litigation by separate suits brought by each of the parties in interest. To justify a bill of peace, therefore, there must be in dispute a general right in the complainant, in which the defendants are interested, of such a character that its existence may be finally determined in a single issue. It is not indispensable that the defendants should have a coextensive common interest in the right in dispute, or that each should have acquired his

¹ Rev. pp. 867, 893.

² Elridge v. Hill, 2 Johns. Ch. 281; Thompson v. Engle, 3 Gr. Ch. 271.

³ Tenham v. Herbert, 2 Atk. 483; Elridge v. Hill, *ubi supra*.

interest in the same manner, or at the same time, but there must be a general right in the complainant, in which the defendants have a common interest, which may be established against all who controvert it, by a single issue.

A reference to a few of the prominent cases will illustrate the principles on which bills of peace are founded. In *Sheffield Water Works v. Yeomans*,¹ a bill was filed by the complainants against Yeomans and five other defendants, and all other persons interested in certain certificates, which the bill prayed might be decreed to be void. The bill stated that a reservoir, belonging to the complainants, had burst, occasioning an inundation, whereby many persons lost their lives, and the property of very numerous persons was damaged ; that, by act of Parliament, commissioners were appointed to inquire into the damages occasioned by the inundation, and, where any claim of damages was assented to by the company, or assessed by the commissioners, the costs of the claimants were to be paid by the company, and the commissioners were to certify accordingly, for which costs, if not paid within a limited time, judgment might be entered against the company. The commissioners made out fifteen hundred certificates, which they lodged with Yeomans, who was town clerk. These certificates the complainants alleged to be invalid. The bill was filed to enjoin the delivery of the certificates, and for a decree that they should be delivered up to be cancelled. The defendants demurred. In overruling the demurrer, Vice-Chancellor Kindersley said : “There were in this case a number of persons, each alleging that he was entitled, as against the company, to be paid a certain sum, to be ascertained, in respect of costs ; each claim was founded on the same state of circumstances, and what would be successful in one case, would be so in all ; each insisted that he was entitled to have out of the custody of the town clerk these documents, in order to adopt the process under the act to recover the costs, that is, to go to the taxing-master and get judgment entered up, and issue execution ; it was, therefore, the case of one body against a number of separate individuals, each claiming, as against the one body, a certain right, the right being the same in all, and the same reasons and arguments applying to all ; now, the question was, whether this was not precisely a case for a bill of peace, *quoad* the form and nature of the bill ; where there were a number of persons claiming as against one, or one person against a number, and where all were claiming alike, that was a case for a bill of peace.” On appeal, the decree of the Vice-Chancellor was affirmed, for the reason that the rights of the numerous claimants

¹ L. R. (2 Ch. App.) 8.

all depended upon the same question—the validity of certificates sealed under the circumstances stated in the bill.

The case of *The N.Y. & N.H. R.R. Co. v. Schuyler*¹ is another apt precedent on the same subject. The complainant was a corporation, whose capital stock was limited by its charter to \$3,000,000, represented by thirty thousand shares of stock. The bill charged that Schuyler, the president and transfer agent of the company, had fraudulently overissued certificates of stock for his own private purposes, amounting to nearly \$2,000,000. Three hundred and twenty-six persons were joined in the suit as defendants, for the reason that they were holders of certificates of stock fraudulently issued. It was alleged that some of the defendants took these certificates knowing they were fictitious; some with reason to believe so; some on usurious contracts; many under circumstances which should have put them on inquiry, and many others under circumstances and upon considerations unknown to the complainants. Some of the defendants had brought suit, and other suits were threatened. The bill joined Schuyler and all the alleged owners and holders of this overissued stock as defendants. It prayed that the certificates might be decreed illegal and void, and be surrendered up and cancelled, and that those who had sued the company might be enjoined from further proceedings therein; and that those who had not sued might be enjoined from bringing actions. On demurrer by one of the defendants, who was the holder of some of the spurious stock, the bill was held to have been properly filed against all the defendants, for the reason assigned by Comstock, J., in pronouncing the judgment of the court, that there was a single interest in the complainants directly opposed to the interests of all the defendants. The common point and centre of the litigation was the stock, property, and franchises of the corporation in which the defendants claimed specific shares and proportions, as holders of the false certificates. The rights claimed by the defendants were distinct, because they rested upon separate instruments as the evidence thereof; but they were of precisely the same nature, as they turned upon the same question, and were a cloud upon the same estate. Each certificate was a false muniment of the holder's title to a particular interest in the corporate estate vested as a unit in the corporation, but equitably belonging to the holders of its actual stock. And all the parties could be united because there was such a unity in the controversy with them all as to render it proper that they should be joined in a single suit.

Fellows *v.* Fellows² is a case possessing the same characteristics as

¹ 17 N.Y. 592.

² 4 Cow. 682.

the one last cited. It was a bill against the several holders of property fraudulently transferred in separate parcels to each, and the bill was sustained because there was one connected interest in all the defendants centering in the point in issue in the case, one common subject of litigation on which the several titles of the defendants depended, which could be determined, and the whole litigation disposed of in the one suit, the result of which would settle the rights of all the parties.

On the other hand, where the interests of the several defendants are entirely distinct and unconnected, and do not present one common subject of litigation, though they relate to the same claim of right in the complainants, such defendants cannot be joined in the same suit. Thus, a bill will not lie against the several tenants of a manor for quit-rents, for the reason that no one issue could have tried the cause between any two of the parties, and no principle would justify the bringing in of two different tenants of distinct estates to hear each other's rights discussed.¹ If a copyright be infringed by different booksellers, the owner of the copyright cannot join all the wrong-doers in the same bill, as the rights of each of the parties stand upon a distinct ground.²

In *Rayner v. Julian*,³ Kenyon, M. R., puts the case of the sale of an estate in lots to different persons, and says that the vendor could not include all the purchasers in one bill for specific performance, as each party's case would be distinct, and depend on its own circumstances. And in *Brookes v. Lord Whitworth*,⁴ a demurrer for multifariousness on that precise ground, was allowed.

*Whaley v. Dawson*⁵ is a case where a demurrer was allowed, although the complainant had grounds for relief against all the defendants, with respect to the same estate; for the reason that there was no common subject-matter of litigation in which all the defendants were interested, and one set of defendants could not be involved in the litigation of a question that related exclusively to the other.

Indeed, the rule with regard to multifariousness, whether arising from the misjoinder of causes of action, or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expenses on the other.⁶ Enough has been said to

¹ *Bouverie v. Prentice*, 1 Bro. C. C. 200.

² *Dilly v. Doig*, 2 Ves. 486.

³ 2 *Dick.* 677.

⁴ 1 *Madd.* 85.

⁵ 2 *Sch. & Lef.* 367.

⁶ *Story's Eq. Pl.* § 539.

show that, in allowing or disallowing objections of this kind, the courts are guided by the consideration whether there is a subject-matter in dispute, in which all the defendants are interested, which is capable of being determined in a single issue, and the determination of which, in that method, would not involve the defendants severally in the needless expenses of the litigation of matters in which they have no concern. The authorities on this subject are quite numerous. A citation of a few of them, in addition to the cases already referred to, is all that is proposed.¹

The question has generally arisen on demurrers to bills in causes of purely equitable cognizance. But in this respect there is no difference between such bills and bills of peace. A bill of peace which shall draw within equitable cognizance causes of action which are purely legal in their character, must conform to the rules and principles of ordinary equity pleading, and, in addition thereto, must possess another element arising from the number of the parties interested and the multitude of actual or threatened suits. In such cases there must be such a unity of interest on the one side or the other, as would justify a joinder of the parties in causes of purely equitable cognizance.²

Passing by the small number of persons who appear to be in anywise interested in the controversy, and regarding only the substance of the bill upon its merits, it is plain that this bill cannot be maintained.

In considering whether there is a subject-matter in dispute in which the defendants are interested, that is common to all the parties, and upon which their several suits at law hinge, their actions must, for the purposes of this record, be grouped into two classes, those brought by McFarlan being placed in one class, and those by the Halseys and their tenants in the other. The only fact that is common to the suits of the parties respectively is, that the company erected its dam, and placed flash-boards upon it, and that the parties respectively claim that an injury resulted therefrom which gave to them severally a legal cause of action. But the right of the company to erect its dam and place flash-boards upon it, and thereby appropriate the waters of the Rockaway river to its use for its canal, to the injury of private indi-

¹ Mayor of York *v.* Pilkington, 1 Atk. 282-4; Ward *v.* Duke of Northumberland, 2 Anst. 469; Weale *v.* West Middlesex, 1 Jac. & W. 358, 369; Campbell *v.* Mackay, 1 Myl. & Cr. 603; Powell *v.* Earl of Powis, 1 You. & Jer. 159; Com'r's of Sewers *v.* Glasse, L. R. (7 Ch. App.) 456; Same *v.* Gellatly, L. R. (3 Ch. Div.) 610-615; Brinkerhoff *v.* Brown, 6 Johns. Ch. 139; Story's Eq. Pl. §§ 271-286, 530-539; Mitford's Eq. Pl. 182; Cooper's Eq. Pl. 182.

² 17 N. Y. 608, Comstock, J.

viduals, is not a matter in actual dispute. The company, in virtue of the terms of its charter, had authority to construct its dam and appropriate the waters of the river to the uses of its canal, without being wrong-doers, subject only to compensation for injuries to individuals, to be recovered by appropriate actions at law.¹ No issue at law is necessary to determine that question, nor could its determination, one way or the other, affect the right of the defendants to prosecute their actions. The company's charter, which authorizes the appropriation of private property to its use without compensation first made, also gives individuals who are injured, a right of action to recover compensation for their injuries. Whether the actions brought by the defendants are in proper form, and the principles upon which damages are to be assessed in case the issues are brought to trial, and a good cause of action shown, are questions of law to be decided by the courts in which the actions are pending.

Nor does there appear, by the pleadings, to be such a unity, either in the grounds on which the actions of the defendants are rested, or in the defenses proposed, as would make a bill of peace and an issue thereunder, the appropriate method of settling the questions involved. McFarlan claims that he was injured by back-water arising from the increase in the height of the water in the pondage of the dam. The Hulseys, and those who represent them, claim that their injuries were caused by the diversion of the waters of the river for use on the lower level of the canal. The Hulseys suffered no injury from the increase in the height of water above the dam, and McFarlan's injury is in nowise attributable to the abstraction of water from the river for use upon the lower level of the company's canal, and which may, to some extent, have been caused by the mode in which the lock and gates at the other extremity of the level were managed. The causes from which the injuries to the parties respectively resulted, instead of being coincident, are divergent. Holding the water at an increased height in the dam, or even in the lower level of the canal, would occasion no injury to the Hulseys as the owners of water rights lower down on the stream, and McFarlan is not, in any manner, interested in the quantity of water abstracted from the river which flowed through the lower level, and was discharged into the company's canal beyond. If the flash-boards should be removed, and the back-water be thus withdrawn from McFarlan's premises, that might not prevent the diversion of which the other defendants complain. And, if the guard-lock at the outlet from the river, or the lock and gates at the other end of the level, should be so managed as to avoid the diversion from the

¹ Lehigh Valley R.R. Co. v. McFarlan, 4 Stew. 706.

river of more water than is brought into it by the canal from above, and thus the grounds of complaint by the Hulseys should be removed, the injury to McFarlan by back-water would still continue, if the dam was maintained at its present height. The trial of an issue in which McFarlan and the Hulseys were the parties on one side, involving the causes of their injuries respectively, would necessarily lead to the introduction of evidence and the investigation of issues pertinent to the complaint of the one party, and wholly irrelevant to that of the other ; and in some respects their interests would necessarily clash. On the trial of such an issue, it would be to the interest of McFarlan to show the great volume of water discharged over the dam, as bearing on the height to which the water was held above the top of the dam, and the interests of the Hulseys would be promoted by showing precisely the reverse.

The proposed defense to the McFarlan suit is that the dam was originally erected by the license and consent of McFarlan's ancestor, from whom he derived title, and that McFarlan was himself a director of the Morris Canal & Banking Company in 1845, when the canal was enlarged, and was fully cognizant of the affairs of the company, and participated in the actions of the company in increasing the capacity of its canal, and the reconstruction of the locks and planes whereby an increase of the height of the water at the crossing of the canal, over the Rockaway river, by the use of flash-boards on the top of the original dam, became necessary ; and that he is equitably estopped from complaining that the use of flash-boards, and the consequent flooding of his mill by back-water, was without his consent. On the other hand, to the Hulseys' suits, and those of their tenants, the defense is, that no more water was taken from the river than was brought into it by the canal from its supply at Lake Hopatcong, and that the company obtained from Joseph Jackson and John D. Jackson, who were formerly the owners of the premises, a grant in the nature of a perpetual license to maintain said dam and flash-boards, which grant or license, by lapse of time, has become lost. The defendants have no common interest in any of these defenses, nor is the other defense of a prescriptive right, which the complainants propose to make to all the suits, one in which the defendants have a common interest. The theory on which title by adverse possession or prescription rests is, that there has been a possession or enjoyment for the full period of twenty years, continued and uninterrupted, adverse to the interest of the true owner, in which he has acquiesced, on which the law presumes a grant which has been lost. A claim of title or right derived from such a source is individualized and personal as against the owner of each separate parcel of land to

which such a claim of title or right is made. The possession may have been permissive, and, therefore, not hostile to the owner of one parcel and not as to the other. It may have been interrupted by the owner of one parcel so as to destroy the continuity of possession and enjoyment of one parcel and not of the other ; and personal disabilities may have suspended the operation of the statute as to the one and not as to the other. It is manifest that the trial of all three distinct issues in one issue, under the direction of the Court of Chancery, would be impracticable.

The decree of the Chancellor, dissolving the injunction and dismissing the bill, should be affirmed.

Decree unanimously affirmed.

NATIONAL PARK BANK OF NEW YORK, RESPONDENT, *v.*
WARREN N. GODDARD ET AL., APPELLANTS.

NATIONAL PARK BANK OF NEW YORK, RESPONDENT, *v.*
WARREN N. GODDARD ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 22, 1892.

[*Reported in 131 New York Reports 494.*]

APPEAL in the first above-entitled action, from order of the General Term of the Supreme Court in the first judicial department, made November 13, 1891, which affirmed an order of the Special Term appointing a receiver of the property of Levy Brothers & Co. and granting an injunction.

Appeal in the second above-entitled action, from order of the General Term of the Supreme Court in the first judicial department, made November 13, 1891, which affirmed an order of Special Term instructing the special receiver of Levy Brothers & Co. with reference to property subject to his receivership.

These actions were brought by the plaintiff as an attaching creditor of Levy Brothers & Co. against Ferdinand Levy as one of the coroners of the city and county of New York, and divers creditors of Levy Brothers & Co., (1) to restrain the prosecution of several actions brought by said several creditors against the sheriff of the city and county of New York for replevin; (2) for the appointment of a receiver of the property in litigation; (3) for an adjudication upon the various claims of the plaintiff and defendants to the property in question, and for other relief generally.

The facts, so far as material, are stated in the opinion.

Gibson Putzel for appellants Goddard and others.

Edward F. Dwight for appellants Oelberman and others.

John Notman for appellants Juillard and others.

Benno Lowey for appellants Haas and others.

Otto Horwitz for respondent.

FINCH, J. The only question presented by these appeals is whether the court, sitting as a court of equity, had jurisdiction of the subject-matter of the action; for, if it had, the order appointing a receiver, and enjoining the prosecution of the suits in replevin instituted by the several defendants, was not only within the discretion of the court, but absolutely essential to the relief which it was its duty to administer. We must determine that question principally upon the allegations of the complaint. No answers had been served when the motion was made, and the equities of the complaint, if such existed, were questioned only by the affidavits used to resist the motion. We may and should take them into the account, but remembering that they constitute defensive allegations and raise to some extent issues of fact which the trial only can determine. The inquiry here is whether upon the plaintiff's complaint, read in the light of the defendants' affidavits, there was jurisdiction in equity over the subject-matter involved, and in answering that question we should recur to the principal facts about which there is no practical dispute, before considering those about which the parties seem to disagree.

The papers on both sides, assuming the truth of their concurring allegations, assert one general fact, affecting all the parties alike and in the same substantial manner. That fact is that the members of the firm of Levy Brothers & Co. formed the purpose, and proceeded steadily and continuously in its execution, of defrauding those with whom the firm was able to deal, by procuring their money or property without payment or accounting, and intending not to pay or account, and effecting the purpose by false representations of their financial ability, and false appearances of solvency when utterly and wholly insolvent. The plaintiff corporation loaned to the firm by discounts of their paper about ninety thousand dollars in reliance upon these fraudulent assurances of the strength and safety of their indorsements, and finding itself thus deceived attached the whole stock of Levy Brothers & Co. which it found in their possession and apparent ownership. The writ was issued upon proof of the representations made and upon the two affidavits of Lilienthal and Hershfield which disclosed the falsity of such representations, the insolvency of the firm, and the fraudulent character of its business dealings. The levy of the plaintiff and the disclosures of the affidavits filed aroused into activity the other victims of the same general fraud. Most of them

had sold goods to the firm, induced thereto by the same or similar false representations of solvency and financial ability. These creditors chose to rescind their contracts of sale for fraud, and in so doing many of them refer to the affidavits on which plaintiff's attachment was issued as the source of their knowledge that the representations made to them were false and fraudulent. Each acting in his own behalf brought a separate action of replevin against the sheriff and the fraudulent vendees to recover the specific property sold, until about fifty of such actions were brought and the writs placed in the hands of the coroner for execution. It is extremely probable that substantially the same representations which were made to the plaintiff were made whenever needed to the fifty or more vendors, and while separate proof thereof will be required, the evidence of falsity and of fraud will be common to them all, and, once proved, be available for each. It is evident, therefore, that the subject to be investigated is at bottom the fraudulent scheme of Levy Brothers & Co. which enveloped all the parties before the court, and affected them all in the same general way, although in different degrees, and, because of that fact, that to some extent the same evidence which will establish the right of one will equally establish the right of all the rest; so that if a court of equity intervenes to prevent a multiplicity of actions only where they rest upon some common right invaded or some common injury inflicted, a doctrine to which, in those broad terms, I do not at present accede, there is here, as the subject of investigation, the one fraudulent scheme of the debtors inflicting in the same way a similar injury upon all their victims, differing in degree, but springing from one general purpose worked out in one general way. In that respect the case reminds me of *Supervisors of Saratoga Co. v. Deyoe*,¹ in which there had been an overissue of notes by the treasurer, creating a false debt against the county. Each holder could sue at law upon his notes and the county defend, but there was one scheme of fraud, common to all in its purpose, working its wrong in the same way and differing only in its results as to persons and degree. That fact, coupled with the further circumstance that the false notes could with difficulty be separated from the true, and only by an investigation which should cover the whole fraud and settle all rights in the process, and so avoid a multiplicity of actions, furnished the grounds upon which the equitable jurisdiction was rested. The present case shows that remaining and corresponding feature in a somewhat different, but equally conclusive way. The stock levied upon by the sheriff consisted largely of manufactured clothing, into which had en-

¹ 77 N. Y. 219.

tered as separate elements the cloth of one vendor, the linings of another, and the buttons of a third; or to the cloth which none of the vendors had sold had been added the linings of one and the buttons of another. How the angry claimants wrangled over the garments and nearly tore them apart, the worried deputy of the sheriff describes. The complaint shows that these claimants have directed the coroner to take upon his writs the whole manufactured article into which the goods of the respective creditors have entered, so that there may be three claimants for the same coat, or one who merely furnished the buttons may take it wholly from the attaching creditor. A court of law cannot divide the article, and so follows a rule, not unjust to the fraudulent debtor, but inequitable as against the attaching creditor, and very likely to be so as to some of the vendors, while a court of equity can turn the garments into money and distribute their value in just and fair proportion. How far these complications extend, we cannot accurately know in advance of the trial, but they are alleged in the complaint as affecting generally the whole manufactured stock.

On this state of facts there is sufficient reason for maintaining the equitable jurisdiction. A subject-matter is presented within its adjudged and defined boundaries. A multiplicity of actions at law, involving conflicting claims to the same property, which a court of law could not solve without working injustice, founded upon one continuous and fraudulent scheme, inflicting a similar injury upon all, and different only in detail and degree, and where the legal remedy of fifty defenses to fifty replevin suits is shown to be destructive to the lien and right of the plaintiff, presents a state of facts which fully justifies the interference of equity.

But in behalf of some of the defendants, it is insisted that there are specific circumstances lying at the foundation of a few of the replevin suits which take those cases out of the doctrine asserted, and that as to the plaintiffs therein, made defendants in the equity suit, there is no equitable cause of action. One or more of the defendants intimate in their affidavits that the property replevied by them was delivered to Levy Brothers & Co. to be sold on commission, and never passed into their ownership at all; and one or more of the defendants assert that there is no dispute as to the identity of the unmanufactured goods which they claim, and no conflicting title thereto alleged by any one except the plaintiff in the attachment. These facts, if satisfactorily established, may possibly prove to be a defense to the action as against such defendants. But these facts are new matter, alleged outside of the complaint, as to which the plaintiff will have a right to be heard. They amount to a denial in some degree of the plaintiff's general allegations, and may establish a defense without

overturning or dislodging the jurisdiction. It often happens that jurisdiction over the subject-matter is followed by a refusal of the equitable remedy to some or all of the plaintiffs, or by a judgment dismissing the complaint as to some or more of the defendants. The plaintiff may come into court with an equitable cause of action, plainly within the jurisdiction, and yet so fail on his facts, or be confuted by the defense, as to lose all right to equitable relief. But that result in general must await the developments of the trial. It is rare that the court is justified in turning the plaintiff out of court on a preliminary motion founded upon affidavits. The present complaint shows that the firm of Levy Brothers & Co. was composed of three persons: that one of them has absconded and cannot be found; that another is sick and has lost his mind; and that the third came into the firm after almost all of the fraudulent purchases were made, and that the plaintiff is necessarily ignorant of the character and circumstances of the purchases made by the firm. It is quite apparent that no one will defend the replevin suits unless it be the sheriff acting in behalf of the plaintiff, and it may very well be that the latter, while now unable to contradict the affidavits, may come to the trial prepared to do so. The complaint also alleges that the seizure by the coroner was far in excess of the value of the property claimed in the replevin suits.

So far as any of the defendants put themselves outside of the general scheme of fraud, and claim that there was no sale to the Levys at all, their affidavits are quite unsatisfactory. Mr. Gruber represents twelve firms and one individual and says that some of them, without naming which, "will contend" that the goods were simply consigned. Mr. Ewing deposes that his goods were delivered "upon memorandum only," but does not disclose the memorandum. He adds that they were "for inspection," and had "not been accepted." Possibly, if we had the facts instead of the affiant's conclusions, we might think there had been an acceptance. All the other cases stand upon the general fraud authorizing a rescission, and while it may be that some of the defendants will be able to show that they claim nothing but unmanufactured goods, perfectly identified, and as to which there are no conflicting claims, yet the fact will not affect the general jurisdiction acquired, but may influence the judgment in the end to be rendered. Something of that kind appears to have happened in *Ostrander v. Weber*,¹ where the course of the trial evolved a purely legal right of one of the parties to a few distinct articles of the property, and the court ordered it to be sold separately. No harm can come

¹ 114 N. Y. 96.

to the defendants who shall show themselves to have a pure legal right which the equities in the complaint do not touch. If there proves to be no conflict over the goods remaining unmanufactured and no equitable cause of action as to them, the court may dismiss the complaint to that extent and allow the replevin actions to proceed. Any injury from delay will be likely to enter into damages for the detention. Or, as in the case cited, the court may order a separate sale of identified parcels.

But it is further suggested that neither the sheriff nor coroner are made parties. They may be brought into the litigation and should be so brought in as parties both in order that they may be bound by the judgment and be protected by it.

A further objection is made that the attaching creditor has no right or title in or to the property attached, and so has no standing in a court of equity to raise any question; and we are referred to the language of the late chief judge in *Scott v. Morgan*,¹ which described the position of the plaintiff in an execution. As a statement of the legal right of the execution creditor no fault is to be found with it. The special property in the goods levied upon is in the officer who holds a legal title for the protection of his levy, but he holds it for the benefit of the levying and attaching creditor, who thereby obtains an interest in and a lien upon the property. He is the real person interested, and equity, which never suffers itself to be misled by a name or baffled by a definition, but deals with the substance and truth of things, can have no difficulty in recognizing the existing interest and lien of the creditor because it is worked out and made effectual through a legal title in the officer.

Our conclusion, therefore, is that there was jurisdiction to make the order, and it should be affirmed, with costs.

All concur.

Order affirmed.

¹ 94 N. Y. 508.

TRIBETTE ET AL. v. ILLINOIS CENTRAL RAILROAD COMPANY.

IN THE SUPREME COURT OF MISSISSIPPI, OCTOBER TERM, 1892.

[Reported in 70 Mississippi Reports 182.]

FROM the Chancery Court of the first district of Hinds County.

Hon. H. C. CONN, Chancellor.

Calhoon & Green for appellants.*Mayes & Harris* for appellee.

CAMPBELL, C. J. A number of different owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the appellee, severally sued in the Circuit Court to recover of the appellee damages for their respective losses by said fire, alleged to have resulted from the negligence of the defendant. While these actions were pending, the appellee exhibited its bill against the several plaintiffs, averring that no liability, as to it, arose by reason of the fire, which arose, not from any negligence or wrong of it or its servants, but from the fault of others, for which it is not responsible ; and that the plaintiffs in the different actions are wrongfully seeking to recover damages by their several actions, all of which grew out of the same occurrence, and depend for their solution upon the same questions of fact and of law. Wherefore, to avoid multiplicity of suits, and the consequent harassment and vexation, all of the said several plaintiffs are sought to be enjoined from prosecuting their different actions, and to be brought in, and have the controversies settled in this one suit in equity. There is no common interest between these different plaintiffs, except in the questions of fact and law involved.

The injunction sought was granted, and the defendants served with process, when they appeared, and demurred to the bill, and moved to dissolve the injunction on the face of the bill. The case was heard on motion to dissolve the injunction, and it was overruled, and an appeal granted.

The question presented is as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the very same matters of fact and law, without any other community of interest between them. The granting and maintaining the injunction are fully sustained by Pomeroy's *Equity Jurisprudence*,¹ and it is probable that any judge authorized would have granted the injunction upon the text cited. But we affirm, after careful examination and full consideration, that Pomeroy is not sustained

¹ Vol. I, § 255 *et seq.*

in his "conclusions," stated in § 269 of his most valuable treatise, and that the cases he cited do not maintain the proposition that mere community of interest "in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body," is ground for the interposition of chancery to settle, in one suit, the several controversies. There is no such doctrine in the books, and the zeal of the learned and usually accurate writer mentioned, to maintain a theory, has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his view of this subject, to wit: joinder of parties, and avoidance of multiplicity of suits. It has been found that many of the cases he pressed into service to support his assertion are on the subject of joinder, where confessedly there could be no doubt that the matter was of equity cognizance. Every case he cited to support his text will be found to be either where each party might have resorted to chancery or been proceeded against in that forum, or to rest on some recognized ground of equitable interference other than to avoid multiplicity of suits. The cases establish this proposition, viz.: Where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable; but this is a very different question from that, whether, merely because many actions at law arise out of the same transaction or occurrence, and depend on the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery; and it is believed that it has never been so held, and never will be, in cases like those here involved. Where each of several parties may proceed in equity separately, they are permitted to unite, and make common cause against a common adversary, and one may implead in one suit in equity many who are his adversaries, in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous, and the suits are for that not in itself a matter for equity cognizance. Attention to the distinction mentioned will resolve all difficulties in considering the many cases on this subject. There must be some recognized ground of equitable interference, or some community of interest in the subject-matter of controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there "is a community of interest merely in the question of law or of fact involved," etc., as stated by Pomeroy in § 268. Although he asserts that this early theory has long been abandoned, he fails utterly to prove it. An

examination of the cases he cited under § 256 *et seq.*, will show this to be true. The opinion of the justice (Harlan) in 43 Fed. Rep. 824, does support the text of Pomeroy, and cites 1 Pom. Eq. Jur. §§ 245, 255, 257, 268, and 273, and Crews *v.* Burcham.¹ We are content with what has already been said as to the text of Pomeroy, and affirm that not one of his citations sustains his conclusion and the language of Harlan, J., in the case cited; nor does Crews *v.* Burcham sustain the language of Justice Harlan. It belongs to the class of cases where each party might have brought his bill, and all who had a common cause were permitted to make common contest in chancery with their adversaries who were united by a common tie.

The decision of the case in which Harlan, J., gave his support to the doctrine of Pomeroy, is not complained of, but the opinion is not justified by any case with which we have been made acquainted. The case was one in which each might have brought his separate bill to quiet title, and all concerned were permitted to unite in one bill against their common adversary; and so, it is believed, will be found all the cases on this subject. Certainly, those relied on by Pomeroy are of this character. Those cited in the note to § 269, in which he asserts most broadly the doctrine we combat, are Keese *v.* Denver,² Carlton *v.* Newman,³ DeForest *v.* Thompson,⁴ Osborne *v.* Railroad Co.,⁵ Railroad Co. *v.* Gibson,⁶ The Schuyler Fraud Case,⁷ The Water Company Case,⁸ and the case of the Complicated Contract.⁹ The case in 43 Fed. Rep. 824, has already been noticed, *supra*. The opinion in the case in 10 Colorado quotes the language of Pomeroy's Eq. Jur. § 269, but the case was one where one or more plaintiffs may sue in equity for the benefit of all others similarly situated.

Carlton *v.* Newman¹⁰ affirms the jurisdiction of equity to enjoin the collection of an illegal tax for the purpose of preventing multiplicity of suits, where the entire levy, affecting all the tax-payers, was illegal. It appears to be exceptional, and to rest on peculiar grounds, not applicable to the case before us. The opinion cites Pomeroy's Eq. § 269, but seems to rest on the proposition that the whole tax was illegal.

The case in 40 Fed. Rep. 375, was that of a plaintiff exhibiting a bill to set aside a sale of land, and vacate deeds made in pursuance of it, against numerous parties, all of whom claimed by separate parcels, but under the proceeding attacked as void. A bill might have been exhibited against each one separately, and it was held to be proper to

¹ 1 Black. 352, 357.

² 10 Col. 112.

³ 77 Me. 408.

⁴ 40 Fed. Rep. 375.

⁵ 43 Fed. Rep. 824.

⁶ 85 Ga. 1.

⁷ 17 N. Y. 592.

⁸ L. R. 2 Ch. 8.

⁹ 7 N. J. Eq. 440.

¹⁰ 77 Me. 408.

unite all in one suit. That was clearly right ; but Jackson, J., in his opinion, concurred in by Harlan, Justice, cited 1 Pomeroy's Equity Jurisprudence, §§ 245-269, inclusive, which we have shown to be unsupported by any case of authority.

The case in 85 Georgia is where a few persons, as representatives of a class consisting of many, exhibited a bill in behalf of all, and lends no countenance to the proposition for which it is cited. The cases in 17 N. Y. 592, L. R. 2 Ch. 8, and 7 N. J. Eq. 440, furnish no sort of support to the text of the author, and it is confidently claimed that every case that can be found, if entitled to any consideration, will be seen to be one resting on some other principle than that for which it has been cited in the connection now under review. And, while judges have, in various instances, cited and sometimes quoted Pomeroy, in the language above characterized as unsupported, in every instance, we think, the case will be found not to call for it, but to be resolvable, independently of it, upon other grounds of equitable interference, and, in our opinion, not one of the learned courts which have cited or quoted Pomeroy in the way mentioned, would sustain this bill if it was before it for decision. There is danger that by frequent repetition and piling up assertions—judges citing and quoting text-books, and text writers citing the cases thus referring to them—a false doctrine may acquire strength enough to dispute with the true ; but we do not believe that any accumulation of dogmatic assertions and citations and quotations can ever establish the proposition that a defendant sued for damages by a dozen different plaintiffs, who have no community of interest or tie or connection between them, except that each suffered by the same act, may bring them all before a Court of Chancery in one suit, and deny them their right to prosecute their actions separately at law, as begun by them. It has never been done. There is no precedent for it, and, while this is not conclusive against it, it is significant and suggestive. If it is true, as stated by Pomeroy, and some quoting him, that mere community of interest in matters of law and fact makes it admissible to bring all into one suit in chancery, in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle. Any limitation would be purely arbitrary. It must be of universal application, and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages, instituted in a dozen different counties, under our law as to the venue of suits against railroad companies, in some of which executors or administrators, or parents and children might sue for the death of a passenger, and, in others, claims would be for divers injuries. If Pomeroy's test be maintained, all of these numerous plaintiffs, having a community of interest in the questions of

fact and law, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages), could be brought before a chancery court in one suit to avoid multiplicity of suits! But we forbear. Surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it, and makes it possible.

The learned counsel for the appellee here felt the difficulty of the possible result of the doctrine contended for, and sought to limit its application to controversies about property, excluding those for injuries to be redressed by the estimation of juries; but, as we have said, any such restriction is arbitrary and inadmissible. If preventing multiplicity of suits is such a good thing as to justify bringing into one suit all who are interested in the same questions of law and fact, it is needless that its benefits shall be extended to all cases where it can be applied, and not restricted in its beneficent operation. It should have full sway in all classes of cases. The sole object, we are told, of the doctrine is to prevent multiplicity of suits by uniting all who have a common interest in the same questions in one suit, and it is quite as important to effect this in one class of cases as another; and, as actions against railroad companies are quite numerous these days, it is of especial concern to prevent multiplicity in this class of cases. Therefore, if the doctrine advanced were sound, it would have to be applied wherever the conditions prescribed exist—that is, wherever many are interested in the same questions of fact and law. That this is inadmissible must be apparent.

The case of *Supervisors v. Deyoe*¹ contains a good illustration of what we have said. In that case the suit against numerous parties was maintained, because it combined elements of jurisdiction in each of the cases of interpleader, bill of peace, and cancellation of written instruments.

The recovery of damages for a tort or breach of contract does not pertain to Courts of Chancery, which decree damages only in a very limited class of cases, or under peculiar circumstances, or as an incident to some other relief.² Even this learned author, Pomeroy, does not say that the existence of numerous suits for damages by a tort or breach of contract, where each case depends on the same questions of fact and law, may be drawn into chancery in one suit, and no case has been found to warrant it. Every case cited by Pomeroy, and by the learned and diligent counsel in this case, has been examined, and may be disposed of on some other principle acted on by Courts of Chancery than that contended for, and necessary to sustain the bill in this

¹ 77 N. Y. 219.

² 1 Pomeroy's Eq. Jur. § 112; 2 Story's Eq. § 799.

case. Every case is resolvable on some well-recognized principle of equity procedure, and not one sustains this bill.

The cases repudiating the doctrine contended for are numerous. We do not cite them, for it is unnecessary, in view of the fact that not a case has been found in England or America to sustain this bill.

No question as to mistake of jurisdiction between courts of law and chancery, within the contemplation of section 147 of our Constitution, arises in this case, for, if we had only one forum armed with full power to administer all remedial justice, joinder of all these parties in one action would not be admissible. Bliss on Code Pleading. This author says, in section 76 : "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down-flow of the water, and may unite to restrain or abate it as a nuisance, but they cannot hence unite in an action for damages ; for, as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had, at one time, carelessly destroyed property belonging to different persons, or the lives of different passengers"; thus putting the very case we have. The Supreme Court of California has cited with approval this very section.

We thus confront Pomeroy with an equally intelligent author, and a decision by the Supreme Court of his own State, at war with his views on this subject, if, indeed, it is true that he would uphold this bill, which we do not believe.

We have written so much to combat error, supported by a distinguished author, and which has had a misleading influence, which should be counteracted before further injury results from it, as far as in our power to do it.

Reversed, and injunction dissolved.

EARL OF BATH AND OTHERS, APPELLANTS, *v.* WILLIAM
SHERWIN AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, JANUARY 17, 1709.

[*Reported in 4 Brown's Cases in Parliament (Toml. ed.) 373.*]

GEORGE, Duke of Albemarle, was in his lifetime seised in fee of divers manors, lands, and hereditaments, in the several counties of York, Lancaster, Lincoln, Middlesex, Essex, Hertford, and Berks ; and, in December, 1669, he settled the same, after his own death, to the use of his son, Christopher, for life ; remainder to his first and other sons in tail male ; remainder to his own right heirs.

On the 3d of January, 1669, Duke George died ; whereupon Duke Christopher, his son, by virtue of the settlement, entered and enjoyed during his life ; and died in 1687, without issue ; after whose death, part of the estate reverted to the crown, other part to one Thomas Pride, as grandson and heir of Thomas Monk, the elder brother of Duke George, who afterwards sold the same to John, Earl of Bath, the grandfather of the present appellant, the Earl ; and as to the residue of the estate, Elizabeth, Duchess of Albemarle, the widow of Duke Christopher, who afterwards intermarried with Ralph, Duke of Montague, was entitled to great part thereof during her life ; and the appellants were severally entitled, under Duke Christopher, to most of the said real estate, part in possession, and the rest in reversion, expectant on the Duchess' death.

Several years after the death of Duke Christopher, a pretence was set up by Thomas Pride, that Ann, Duchess of Albemarle, Duke Christopher's mother, who had formerly been married to one Thomas Radford, was never married to Duke George ; or if she was, yet that her first husband was then alive, and was also living at the birth of Duke Christopher, on the 14th of August, 1653 ; and consequently, that Duke Christopher was not the lawful issue or heir of Duke George ; but that Pride, as the real heir at law of Duke George, was entitled to the whole estate.

On this title Pride caused an ejectment to be brought on his own demise, for part of the estate, against the said John, Earl of Bath, Ralph, Duke of Montague, and others ; and this cause being tried at the bar of the Court of Queen's Bench on the 6th day of February, 1694, by a Hertfordshire jury ; a verdict, upon full evidence, was given for the defendants.

After Pride's death, Thomas Pride, his son, upon the same title, caused another ejectment to be brought on his demise, for other part of the estate, against the same parties ; and upon the trial of this cause at the bar of the same court, by an Essex jury, on the 24th of April, 1696, a verdict was again given for the defendants upon full evidence.

Thomas Pride, the son, afterwards died, leaving three children ; who having all died without issue, Elizabeth, the late wife of the respondent, Sherwin, became his heir at law ; and thereupon she and her said husband, on the same pretence of title, caused an ejectment to be brought on their demise, for a different part of the estate, against Sir Walter Clarges and others ; and this ejectment being also tried at the bar of the Court of King's Bench, by a Yorkshire jury, on the 8th day of May, 1700, a private verdict on full evidence was given for the then defendants, and Sherwin and his wife being duly called, suffered a nonsuit. But notwithstanding this, they soon afterwards thought proper to bring another ejectment on the same title, for the same lands, and against the same parties ; and this being tried in the same manner, on the 15th of

November, 1700, a verdict was given for the defendants upon full evidence.

But Sherwin and his wife, still restless and uneasy, made use of various practices and contrivances to prevail upon the tenants of Sir Walter Clarges to attorn to them, and in part succeeded ; whereupon Sir Walter Clarges caused an ejectment to be brought against Sherwin and his wife, and their tenants, as well on his own single demise, as on the demise of the executors of Duke Christopher ; and this cause being tried at the bar of the same court, by a Yorkshire jury, on the 4th of May, 1703, a verdict was given for the plaintiff.

The single question upon all these trials was, whether Duke Christopher was the lawful son and heir of Duke George, or not ? The jurors upon each of them were gentlemen of quality and character in the said several counties ; and the judges who tried the causes took great time and pains in the trials, and expressed themselves well satisfied with the verdicts.

Notwithstanding the uniform event of these five trials, Sherwin and his wife caused other declarations in ejectment to be delivered for different parts of the estate in the possession of the appellants ; and they also took upon them to borrow money, and to grant several derivative interests in this estate to the several other respondents ; whereupon the appellants, in Michaelmas Term, 1703, exhibited their bill in Chancery against the respondents, praying that all questions touching the legitimacy of Duke Christopher, or concerning his being the son and heir of Duke George, might be quieted and extinguished ; and to that end, that a perpetual injunction might be awarded to stay all further proceedings at law upon the said pretended title, and to prevent multiplicity of suits and endless vexations.

On the 28th of June, 1709, this cause was heard before the Lord Chancellor Cowper ; when his Lordship was pleased to decree, that the bill should stand dismissed with costs.

But from this decree the plaintiffs appealed ; and on their behalf it was insisted, that a perpetual injunction ought to have been granted, upon the circumstances of the case ; and because the matter and only point in question had undergone so many and such strict examinations, and had been so fully settled by no less than five trials at bar, all the same way, and in the most solemn manner possible. That such pretence of title ought the rather to be silenced, because Duke Christopher lived near twenty years after the death of his father, and during all that time enjoyed as well the paternal estate of the family, as the honors of it, in the capacity of heir male of the body of Duke George, and could not have enjoyed the same had he not been so : that neither Thomas Pride, the father, or Thomas, the son, or Elizabeth Sherwin, in all this

period, ever set up or pretended to have any title to any part of the paternal or other estate ; but, on the contrary, owned Duke Christopher to be (as he really was) the lawful son and heir of Duke George, and so he was also acknowledged by King Charles II., King James II., and King William ; was received and sat as such in the House of Peers ; and under that title was appointed Lord Lieutenant of several counties in England, and also Generalissimo of the Western Plantations ; that there seemed a still higher reason for a Court of Equity, after so many solemn trials, to interpose in this matter, since it was to silence an odious question, touching the legitimacy of a noble person, started and prosecuted after his death ; and by the present method of proceedings in ejectment, the appellants, unless relievable in equity, would be liable to perpetual suits and vexations upon the same question. As to the objection, that the common law having fixed no bounds to the number of trials in ejectment, persons were at liberty to prosecute in that way as often as they pleased, and therefore a Court of Equity ought not to restrain their right; it was answered, that the method of trying the title to inheritances by ejectment was of no very long standing, for the ancient way of trying such rights was in real actions ; and there, the wisdom of the common law had fixed proper limits to such prosecutions, for preventing vexatious and endless contests : and as so great an inconvenience, and even abuse of the law was practiced in this case, it was highly reasonable that a Court of Equity should interpose, and obviate the mischief by granting a perpetual injunction, after the right and the only matter in question had been tried so often and fairly settled by so many solemn and concurring verdicts. That there were many precedents where Courts of Equity had granted perpetual injunctions for quieting inheritances, after two trials, and where only one of those trials had been directed by such court ; and it was conceived that the reason in this case was full as strong, where the respondents, by their own choice, had tried the single point in question by five several juries, in three different counties.

On the other side it was contended, that where any person has a right of entry into lands, he may by law enter whenever and as often as he pleases, and, when in possession, may make a lease ; and if the lessee be disturbed, an ejectment may be brought in his name. And this right the law had not thought fit to limit or restrain, but looked upon the party's bearing his own charges, and paying his adversary's costs, to be a proper penalty on the one, and a sufficient compensation to the other ; so that upon these terms he might bring as many ejectments as he pleased : and, therefore, to reverse the present decree would be directly to make a new law. That the title of the respondents was the title of an heir at law, who is the favorite of the law ; but that of the appellants was at best but the title of a volunteer, and therefore not to be protected

against the heir. That for some part of the estate no ejectment had yet been tried; and the respondents were in possession of other part of it, which the appellants could not recover without a trial; so that the question could not be considered as closed, while, with respect to any part of the estate, it remained untried. And that the matter in question was purely a matter of fact, triable by a jury, without involving any one point proper to give a Court of Equity jurisdiction; nor was there any one precedent of such a decree as the appellants sought for in this case, where the question was singly a point of fact, between heirs at law on the one side, and persons claiming under a voluntary conveyance on the other.

But after hearing counsel on this appeal, it was ordered and adjudged, that the decree of dismissal complained of should be reversed: and that the Court of Chancery should forthwith issue a perpetual injunction to stay the proceedings at law of the defendants in Chancery, and all claiming under them, against the now appellants and all claiming under them, upon the pretended title of the said defendants, grounded upon the alleged illegitimacy of Christopher, late Duke of Albemarle.

ELRIDGE *v.* HILL AND MURRAY.

IN THE COURT OF CHANCERY OF NEW YORK, DECEMBER 30, 1816.

[Reported in 2 *Johnson's Chancery Reports* 281.]

THE bill stated that the plaintiff is seised, in fee, of lot No. 13 in Young's Patent in Sharon, in Schoharie County, and that he and those under whom he holds have been in possession for upwards of twenty years. That the defendant, Hill, possesses lot No. 41, adjoining it, under the defendant Murray. That Wm. Hovey, who possessed lot No. 41 about six or seven years ago, erected a carding machine, within a few feet of the line between them. That an ancient stream runs through lot 41, to and through lot 13. That the machine was not placed on the stream, but at some distance, and the water from the stream conducted to the machine by means of a ditch, and from it by a ditch dug to the lot 13, and into and through that lot until it came to a descent, so that the water would run off, without a ditch, into the natural channel. That the said ditch was so dug before the plaintiff purchased the lot of Barnabas Le Grange. That Le Grange never gave any license to make the ditch, nor is any such license set up by the defendants. That until the 9th of July last, the defendant has been in the quiet possession of the ditch, through the land of the plaintiff, as a watercourse. That the plaintiff wishing to use the water, by a mill, and to cause it to flow back to his line, the defendant refused to fill up his ditch, and the plaintiff

placed a partial obstruction in the ditch on his own land, about $1\frac{1}{2}$ feet high, which forced the water back to the wheel of the machine. That he did this to give the defendant an opportunity to try his right, for if the plaintiff cannot fill up the ditch, nor flow the water into it, he cannot build a dam on his own land. That the defendant, Hill, sued the plaintiff for that obstruction, in the Supreme Court, and the cause is there at issue. That Hill afterwards commenced a suit before a justice of the peace for a continuance of the obstruction, and has sued the plaintiff every week since, before the same justice, for the same obstruction. That there have been commenced, in all, 15 or 20 suits, one of which was brought to trial on its merits, and a verdict given against the present plaintiff, who has sued out a *certiorari*, and had the same allowed, for removing that judgment into the Supreme Court. That the defendant, H., continues to commence suits weekly, and threatens to do so indefinitely.

The bill prayed for an injunction to restrain the defendant, H., from further prosecuting the suits before the justice already pending, and from commencing any more, on account of the obstruction aforesaid, until the suit commenced by the defendant, Hill, in the Supreme Court be determined.

Seely, for the plaintiff, moved for the injunction.

The CHANCELLOR.¹ A bill of peace, enjoining litigation at law, seems to have been allowed only in one of these two cases: either, where the plaintiff has already, satisfactorily, established his right at law, or where the persons who controvert it are so numerous as to render an issue, under the direction of this court, indispensable to embrace all the parties concerned, and to save multiplicity of suits.² In the case in Atkyns, Lord Hardwicke refused to interfere between two individuals, until the right was first tried at law. In the present case there has been but one trial at law, and that one was decided against the plaintiff. The controversy is between him and a single individual, and is pending for decision in the Supreme Court. If the defendant, Hill, continues to harass him with fresh suits at law, it is because a new cause of action (as he alleges) continues to arise daily, by the continuation of the nuisance. No case goes so far as to stop these continued suits between two single individuals, so long as the alleged cause of action is continued, and there has been no final or satisfactory trial and decision at law upon the merits.

Injunction denied.

¹ James Kent.—ED.

² Lord Bath *v.* Sherwin, 1 Bro. P. C. 266; Ewelme *v.* Andover, 1 Vern. 266; Leighton *v.* Leighton, 1 P. Wm. 671; Trustees of Huntington *v.* Nicoll, 3 Johns. Rep. 566; Tenham *v.* Herbert, 2 Atk. 483.

WILLIAM MARSH v. SAMUEL REED.

IN THE SUPREME COURT OF OHIO, DECEMBER TERM, 1841.

[Reported in 10 Ohio Reports 347.]

THIS is a bill in Chancery from the county of Scioto.

It is brought by the complainant to be secured by the decree of this court in the possession of a tract of land which has been the subject of litigation in repeated suits at law. The bill alleges that the complainant is in possession of the land, and that he has the legal title to it. That the defendant, on the 2d of April, 1832, instituted an ejectment against him, which was appealed to the Supreme Court, and, being tried by a jury, a verdict and judgment was rendered for the present plaintiff. That the defendant not being satisfied with this result commenced another ejectment for the same land, in the Common Pleas of Scioto County; that this suit, like the former, was appealed to the Supreme Court, where, like the last, it was tried by a jury, and that on substantially the same testimony the present plaintiff again recovered a verdict and judgment. That the defendant moved for a new trial for misdirection of the court, that this motion was taken to the court in bank, where it was elaborately argued, and that the court, after a very full consideration, were of opinion that there was no error in the instructions of the court who tried the cause, and thus refused to grant a new trial.

The bill then alleges that notwithstanding this apparently final determination of the matter, the defendant has instituted a third action of ejectment against him. The plaintiff therefore, in consequence of these repeated efforts to disturb a title, which has so often been adjudged to be good in the proper forum, has filed this bill to quiet his title.

The answer relies principally on the misconstruction which was given on the former trials to the law of the United States under which both parties claimed; for it admits the possession of the plaintiff and the various recoveries which have been hitherto had.

Mr. Vinton for the complainant.

T. Scott & Son for the defendant.

GRIMKE, J. The issue which the defendant attempts to make in this case appears to me to be entirely irregular. It contradicts all the most settled principles by which a Court of Chancery is governed. I doubt whether it would be competent for this court to re-examine a title which has been heard and determined in a court of law, and of which a court of law appropriately and exclusively had cognizance. It is not like an issue directed out of Chancery, where the court is at liberty, notwithstanding the finding of a jury, to make up a decree upon its own opin-

ion of the merits of the controversy. In that case the proceedings originate in a court of equity; the issue at law is not a matter of course, it depends upon the discretion of the court, and the verdict in the other court is so merely auxiliary to the proceedings in Chancery, that it does not necessarily constrain this last court to renounce an opinion which may be directly adverse to it. I admit, indeed, that if this bill were filed under the 14th section of the Chancery Act, it would be competent for the court to examine the title, because there also the proceeding is an original one in Chancery. But neither of these is the case here; the bill is framed under the general jurisdiction which a Court of Chancery exercises in cases of this kind, which is to quiet a party in the possession of a title which has been already tried and determined at law, and which fact alone almost gives a complainant a peremptory right to demand a perpetual injunction against any further disturbance of his right. The 14th section of the statute to which I have referred confers upon a complainant a greater advantage than he before possessed, inasmuch as it does not require a previous trial at law. But this complainant has not pursued this summary remedy; he is satisfied with procuring the more difficult and arduous relief which a Court of Chancery, independently of statute, is in the ordinary habit of granting. He presents a case where upon a controversy relating to the boundary of land, he has obtained two verdicts and judgments in ejectment, and where in addition to this the validity of his title has been still further fortified by a re-examination of the law of the case in the court of highest resort. The extreme inconsistency and confusion which would be produced, if in the present suit the merits of the original controversy were to be tried, will be evident on the slightest reflection.

This proceeding could not be here, if the title had not been previously determined at law. It is that which gives the equity court its whole jurisdiction, because the controversy involving a matter which pertains exclusively to a court of law, the Court of Chancery can only determine, not whether the title has been rightly found at law, but whether sufficient effort has been made in order to its being rightly found. If this were not the case, the parties and the court would be moving in a perpetual circle, and the controversy could never be terminated. I do not mean to say that a Court of Chancery may not decline the relief asked, but that will still be, not because it puts a different construction on the title, but because the case does not assume a shape for equitable interposition.

Now what is the rule which is usually and habitually administered in cases of this kind? It is, that a complainant shall be in possession, and that he shall have established his right at law. No precise number of trials is necessary. "I am inclined to think," says Kent, C. J., in

Huntington *v.* Rickall,¹ "that there is no positive rule as to the number of verdicts which must precede the bill of peace." Story, in his Commentaries, Vol. 2, p. 152, says the same: "If," says he, "the trial has been satisfactorily established at law it is not material what number of trials have taken place, whether two or more." Can there be a doubt, then, but that this complainant is entitled to the relief he asks? The mere history of the case in its progress through the other court demonstrates that the title has been satisfactorily established. The questions of law were elaborately argued and carefully examined by the court; and although we have properly nothing to do with the nature of the title now, yet we have again re-examined it, and are satisfied that the principle which was determined at law was correct. That principle was, that in executing surveys under the laws of the United States the mere marking a corner by the surveyor establishes no boundary, but each marked corner is controlled by the actual division lines made, field notes of which are returned to the proper officers and preserved according to law. This is no more than declaring an acknowledged principle, that in surveys executed by the officers of the United States, the lines legally run and established by them, and not those which are arbitrarily and mistakenly drawn, constitute the true boundaries of the land. The plaintiff is therefore entitled to a decree for a perpetual injunction, securing him against any further disturbance of the title and possession of the land.

Decree for the complainant.

WEST AND OTHERS *v.* THE MAYOR, ETC., OF THE CITY OF NEW YORK.

IN THE COURT OF CHANCERY OF NEW YORK, JANUARY 16, 1844.

[*Reported in 10 Paige 539.*]

THIS was an application, by the defendants, for the dissolution of an injunction granted by the late injunction master of the first circuit, restraining the defendants from prosecuting suits against the complainants, or their agents, cartmen, or servants, for breaches of the corporation ordinances relative to the weighing of anthracite coal in the city of New York.

L. H. Sandford for the complainants.

P. A. Cowdrey for the defendants.

The CHANCELLOR.² The question as to the validity of the corpora-

¹ 3 Johns. 601.

² Reuben H. Walworth.—ED.

tion ordinances does not properly belong to this court for decision ; where the complainants, as in this case, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalty. And it would be an usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. In the case of *Oakley v. The Mayor, etc., of New York*, decided in April, 1840, which was a bill for an injunction to restrain the prosecution of suits at law under the market ordinances, I decided that if the objections to the legality of those ordinances were well taken, the complainant had a perfect defense at law. And that this court would not grant an injunction to protect him against a multiplicity of suits, until his right to such protection had been established by a successful defense at law in some of the suits.¹ In the present case the complainants' bill does not show that they have established their right at law ; but on the contrary, it is distinctly stated in the bill that in some of the suits which have been commenced the decision has been adverse to the complainants, and that the other suits have not yet been decided. It is true they complain that in those cases the court decided the law against them, and did not submit the legality of the ordinances to the jury to be decided as a matter of fact ; and that they intend to carry the question as to such legality before a higher tribunal for a decision. But neither of those circumstances can give jurisdiction to this court to interfere, before the right of the complainants is established by such higher tribunal. And if they are successful there, it is not probable that the interference of this court will be necessary.

The cases referred to by the counsel for the complainants on the argument, where bills of peace have been sustained, by the Court of Chancery, to settle the rights of parties in a single suit brought under the direction of the court, are cases as to rights of common, or of fishery, etc., where the questions to be determined are questions of fact, or are mixed questions of law and fact. But I am not aware of any case in which this court has sustained such a bill, to prevent the defendant from suing at law, where the rights of the parties depended upon a question of law merely ; and where the defendant in the suit at law must eventually succeed, without the aid of this court, if the law was in his favor. The bill in the present case cannot therefore be sustained for any purpose. And the injunction must be dissolved, so far as it was not dissolved upon the argument, with costs to the defendants.

¹ See *Eldridge v. Hill*, 2 John. Ch. Rep. 281.

FOXWELL v. WEBSTER

AND

FOXWELL v. OTHER DEFENDANTS.

IN CHANCERY, BEFORE SIR RICHARD TORIN KINDERSLEY, V. C.,
NOVEMBER 19, 1863.[Reported in 2 *Drewry and Smale* 250.]

In this case Foxwell was the assignee of a patent granted to Judkins for sewing and stitching machines, and he had filed 134 bills against Webster and other defendants to restrain infringement of his patent.

Four motions were now made by four groups of defendants, amounting in the whole to seventy-seven. The notices of motion differed in some slight particulars, but the substance of them all was nearly the same, that the suits should be consolidated in this sense, viz., that either one suit to be selected by the plaintiff should be prosecuted, and proceedings in the others stayed until the determination of that one suit, or until the validity of the patent should be established in it; or that issues in a suit by Foxwell against one or more of the defendants should be tried as to the validity of the patent (the common case of all the defendants being that the patent was bad, though each denied infringement if the patent was good); that in the meantime the other suits should be stayed, or that in the meantime at least the time for answering should be enlarged till the determination of the model suit. All the defendants appearing were willing to be bound by the decision in the model suit as to the validity of the patent; but each reserved to himself his defense on the ground of non-infringement.

It should be observed that the machines alleged to be infringements were somewhat numerous; but all the defendants present, and it was said all the absent defendants, used some one or more of these machines, each of which was alleged to be more or less different from Judkins', so that the defendants were capable of being grouped, though it did not appear in what number of groups, even as to infringement.

Mr. Rolt, Mr. Kay, and Mr. Bagshawe appeared for nineteen defendants.

Mr. Osborne and Mr. F. Waller for another group.

Mr. Freeling for another group.

Mr. C. Roupell for another group.

The substance of the arguments was as follows:

Where you have a general exclusive right alleged to be vested in the plaintiff, and a general denial of that right by numerous defendants, the court will say that the validity of the right shall be determined once for all against all the defendants, before trying the fact as against each defendant whether each defendant has infringed the right; for if the right

cannot be supported, there is an end to the question of infringement. The court will even exercise this right in a single suit, and instances are frequent where, on a motion for an injunction or a receiver, the court has directed preliminary proceedings at law to try the validity of the right before proceeding further. *A fortiori* will it do so where there are a great many suits, in all of which the defendants challenge the right. At law, where there is a case of this kind, a plaintiff claiming one right in separate actions against a great number of defendants, consolidation is of course, and pending the decision of the consolidated action, all the others are stayed. These suits are oppressive ; their object is to crush a whole trade. The plaintiff ought to have followed the usual course of trying his case against one or two defendants, and those suits would have probably settled the question in most of the other suits ; such wholesale litigation is an oppression too upon the public ; if these suits are all to go on, this court will have nothing to do for the next two years but to try Judkins' patent. It will be said on the other side that the plaintiff has a right to discovery ; but he has no such right if his patent is invalid ; and under cover of his *prima facie* title he is asking 134 separate manufacturers or users to divulge to him the secrets of their trade. The defendants offered to be put on terms to let the plaintiff have inspection of the machines used by them, or to file affidavits stating the nature of such machines.

The following authorities were cited : Kent *v.* Burgess ;¹ Fullagar *v.* Clark ;² Bacon *v.* Jones ;³ Lord Teynham *v.* Herbert ;⁴ Mayor of York *v.* Pilkington ;⁵ Chitty's Practice ;⁶ Mayer *v.* Spence ;⁷ De la Rue *v.* Dickinson ;⁸ Scomburne *v.* Wilson ;⁹ Damer *v.* Portarlington.¹⁰

Mr. Glasse, *Mr. Locock Webb*, and *Mr. T. Aston* (of the common law bar), for the plaintiff, were not heard.

THE VICE-CHANCELLOR. There are four motions before me, made in this state of things, the plaintiff is or alleges himself to be the proprietor of a patent for sewing machines. The defendants in the different suits are 134 in number, and the plaintiff alleges them to have separately infringed his patent ; and it is apparent that these are motions in which a great number of persons are combining together to resist the plaintiff's claim.

Now this is the position of the patentee : if he were to attempt to bring together in any one suit any number, even more than one defendant, and any one defendant were to object that he ought not to be

¹ 11 Sim. 361.

² 18 Ves. 481.

³ 4 Myl. & Cr. 433.

⁴ 2 Atk. 483.

⁵ 1 Atk. 282.

⁶ Page 1347 (11th edit.).

⁷ 1 John. & H. 87.

⁸ 3 K. & J. 388.

⁹ 3 K. & J. 390.

¹⁰ 2 Phil. 30.

mixed up with the others, the objection would be successful ; for a patentee has no right to join as defendants any number of persons infringing ; not even two.

Now here the plaintiff has filed 134 bills against 134 different persons who he alleges are infringing ; and it is said, how can it be necessary to file so many bills ? Why does not the plaintiff proceed against some one infringing and see the result before filing any more bills ? I have no doubt the plaintiff would be very glad if he could take that course safely ; for the filing of each bill must be a considerable expense to him. But it is a settled rule of this court that if a person wishes to obtain an injunction he must not sleep upon his right, he must come to the court speedily ; and if in this case the plaintiff had proceeded against one or more of the persons alleged to be infringing, and abstained from filing bills against the others, his remedy by injunction as against them would have been prejudiced. It would be in vain for him to say he was waiting the result of a trial against some others. Each one would have a right to say, "I have nothing to do with any other infringer ; you charge me with a wrong ; you ought to have come with your charge at once." Therefore, assuming the patent to be valid, the patentee must, in order to preserve all his rights, proceed without delay against every separate infringer.

Then it is argued that the course taken is oppressive ; against whom is it oppressive ? how is any one defendant oppressed because others are also attacked ? If it be meant that there is an association of defendants who have made a common fund against the plaintiff, and that association will be put in a worse position, that is certainly a circumstance that I cannot look at. Well, then, it is further said that the course taken is oppressive against the public, if 134 suits are to be allowed to go on by the same plaintiff claiming in the same right. And I agree that in the abstract the court would endeavor to have the whole consolidated, so as to have but one or two trials ; but then it can only do so consistently with what is just to the plaintiff. It cannot do so at the expense of his clear rights.

Now what is asked by the motions in these four cases ? What is asked is in substance to stop all the suits till one of them is disposed of, or in the alternative to stop them until at least the validity of the patent is determined in one suit, or until further order ; and that in the meantime the proceedings in the other suits may be stayed, or that the time for answering in the other suits may be enlarged ; the defendants in the other suits undertaking to be bound so far as concerns the decision of the validity of the patent ; but not undertaking to be bound as regards the question of infringement. Now let us see how far the defendants are entitled to what they ask.

There are before me seventy-seven suits, leaving fifty-seven still untouched. It is contended that I ought now to direct an issue or issues to be tried before me for determining in the first instance the validity of the patent. The notice of motion does not in terms ask that, but I will assume that not to be material. Cases are cited to show that if justice requires it the court will direct as a preliminary the trial of some question, which, if decided against the plaintiff, leaves him no *locus standi* for further relief. And no doubt the court has, upon motions for an injunction or a receiver, where it has seen that it was necessary, directed an issue to try the preliminary question ; and it will do that where there is a single suit. But here it is contended that, because there is a great number of suits, the defendants may on their motion ask that, until the decision of the preliminary question, they shall not be troubled with those suits. Now I am not going to determine that, under given circumstances, the defendants might not be entitled to that. I will assume that such circumstances may exist. But what is asked here is not merely that, it is asked that in the meantime the defendants shall not be obliged to answer. Now here there are in each case questions between the plaintiff and each defendant ; first, questions going to the validity of the patent, and a question whether each defendant has infringed. It is urged that if the patent is bad it is immaterial whether any defendant has infringed it. The plaintiff says, on the other hand, "I do not object to a stay of proceedings at the proper time ; I do not want to go on with all the suits at once; but I want your answers before anything else is done; either admit infringement or let me know by your answers what you have done and what you are doing, so that, if I succeed in establishing my patent, I may have at the hearing such a decree as your answers may entitle me to." The plaintiff has, I think, a right to assume that the answers will be such as to entitle him to a decree against each defendant.

It is quite true that there may be cases upon exceptions, where the court will say, if the defendant has answered as to that which is material as the foundation of the suit, he shall not be obliged to go into details. But here what is asked is not to put in even that species of limited answer, but not to put in any answer at all, sufficient or insufficient, and certainly that could not be allowed if it were the case of a single suit. But then it is said, that because there are 134 suits it is different. How is it different ? Has not the plaintiff, as against each defendant, a right to know what are the machines he uses ; what is their structure, etc. ? No one defendant is required to put in 134 answers, or to answer as to anything except what he separately has done. The fact that there are 134 suits does not affect the duty of each defendant to answer the interrogatories addressed to him, and which will or may give the plain-

tiff the benefit of a decree. Then as to the action that has been tried;¹ I will assume that there has been no decision in favor of the plaintiff. I will assume, that he will get no equitable relief till he has established his legal right; on that assumption, the conclusion to which I come is this: That according to the abstract proposition, that the court will, where there is the case of a single individual taking proceedings at law or in equity against a great number of persons infringing the same right, do all it can in the way of consolidation, to avoid multiplicity of suits, it will do so only so far as is consistent with justice to both parties.

The object of these motions is, to do that which may be in the abstract reasonable, but which is to deprive the plaintiff of his right to discovery. The mistake made in these motions is, that this is not the state of the cause for them. The defendants have come too soon. I must dismiss the motions, but in dismissing them I mean the order to be without prejudice to any application after answer, with a view to regulate the course of these numerous proceedings.²

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THE THIRD AVENUE RAILROAD COMPANY, RESPONDENT,
v. THE MAYOR, ALDERMEN, AND COMMONALTY
OF THE CITY OF NEW YORK, APPELLANTS.

IN THE COMMISSION OF APPEALS OF NEW YORK, JUNE TERM, 1873.

[Reported in 54 New York Reports 159.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of the plaintiff, entered upon an order of Special Term overruling a demurrer by the defendants to the plaintiff's complaint.

This action was brought by the plaintiff to restrain the defendants from prosecuting more than one of seventy-seven actions, which, as the complaint alleged, had been commenced by them against the plaintiff in the Justice's Court in the city of New York for the first judicial district, until one of such actions could be finally heard and determined. Each of the said actions was brought at the same time to recover a separate

¹ An action, which had been settled without any final decision, was referred to in the arguments.

² These motions were carried by appeal to the Lord Chancellor, and by consent of the parties, at his Lordship's suggestion, an issue between Foxwell and one defendant representing the seventy-six others, and some more who (by leave) came in under his Lordship's order, was directed to be tried as to the validity of the patent.

and distinct penalty of fifty dollars, prescribed and imposed by an ordinance of the defendants, for running a passenger railroad car within certain specified limits of the city of New York without a license or certificate from the mayor, and was at issue and untried at the commencement of this action, but had, on an adjournment, been set down for trial at a short day thereafter.

A demurrer was interposed to the complaint, and judgment thereon was rendered, at Special Term, in favor of the plaintiff.

Richard O'Gorman for the appellants.

Clarkson N. Potter for the respondent.

LOTT, Ch. C. The jurisdiction of a court of equity to prevent, by injunction, a multiplicity of suits is unquestionable, and, according to my understanding of the points of the appellants' counsel, is not denied by him; but he claims that "an injunction to restrain the proceedings in another suit, either in the same court or in another court having equal power to grant the relief sought, will no longer be granted." Conceding the general rule to be as claimed by him, it does not apply to the facts stated in, nor the case made by, the plaintiff's complaint. To make it applicable, it must appear that the Justice's Court, in which the actions sought to be restrained are pending, has power to grant the relief asked by the complaint in this action. This is not claimed by the counsel. That court is also without a very important power, possessed by courts of record, which, if it existed in reference to actions pending therein, would have rendered the present action unnecessary. Any court of record has the power, whenever several suits are pending in it by the same plaintiff against the same defendant for causes of action which may be joined, to order the several suits to be consolidated into one action.¹ The Supreme Court has also the power, if one or more of such suits be pending in the Supreme Court and others be pending in any other court, to order the suits in other courts to be consolidated with that in the Supreme Court.²

The above provisions, it will be seen, do not reach the suits sought to be restrained, and the Justice's Court in which they were pending had not, as I have stated, the power of consolidating them. The plaintiff must, therefore, have been subjected to the cost and expense of the defense of all of those actions, if it had not obtained relief under its complaint in this suit.

It is material to bear in mind, in consideration of the questions raised by the demurrer to the complaint, that it is not asked to restrain the defendants from obtaining a decision by the Justice's Court of the question involved in the actions pending therein; but the continuance of the

¹ 2 Rev. Stat., p. 383, § 36.

² Id. § 37.

prosecution of one of them is suffered and permitted, and an injunction to restrain and forbid the proceedings in the others of them is only asked until that which shall be proceeded in can be finally heard and determined, and the injunction granted by the judgment appealed from is to that extent only. The question to be decided in all of the suits is the same, and a single one, depending on the same facts. The decision made in the one which is to be prosecuted will, in its effect, be a decision of all of them. The injunction asked and granted does not operate as an absolute but a temporary stay only of the actions to which it applies, and the plaintiff has offered in the complaint to give any security required for the payment to the defendants of the sum claimed in all of the said actions if it should be finally decided that it is liable for the penalty by said ordinance prescribed, and for the expense of prosecuting such action or actions as might be necessary to determine the same. The case is different from those of *West v. The Mayor, etc.*,¹ and *Oakley v. The Mayor, etc.*² The injunction asked in them was to restrain absolutely the prosecution of any suits at law for breaches of certain corporation ordinances. They are therefore clearly distinguishable from this. The relief herein was substantially to the same effect as that which would have been obtained if the actions had been all pending in the Supreme Court or any court of record by a consolidation of them.

It is said by Judge Story that "courts of equity discourage, in various forms, the promotion of unreasonable litigation, and on this ground, for the purpose of preventing a multiplicity of suits, they will not permit a party to bring a bill for a part of a matter only, where the whole is the proper subject of one suit. Thus, for example, they will not permit a party to bring a bill for a part of one entire account, but will compel him to unite the whole in one suit, for otherwise he might split it up into various suits and promote the most oppressive litigation. Upon a ground somewhat analogous, if an ancestor has made two mortgages, the heir will not be allowed to redeem one without the other."³ The same principle is clearly applicable to the present case.⁴

The prosecution of all of the suits referred to in the complaint at one and the same time would be unnecessarily oppressive, by having costs incurred which it is said in the complaint would be "onerous and oppressive"; and the case is one, under all the facts disclosed, where the interference of a court of equity was properly invoked and exercised.

¹ 10 Paige's Rep. 539.

² Cited and referred to in that of *West*.

³ Story's Eq. Pl. § 287.

⁴ See also, in support of the principle, Story's Equity Jurisprudence, § 457; id., § 853; id., § 901; *Hanson v. Gardiner*, 7 Ves. Ch. Rep. 305, etc.; *Livingston v. Livingston*, 6 John. Ch. 499; *New Haven R.R. Co. v. Schuyler*, 17 N.Y. 608.

The result of the views above expressed is that the judgment appealed from should be affirmed, with costs.

All concur ; REYNOLDS, C., not sitting.

Judgment affirmed.

POWELL AND OTHERS *v.* THE EARL OF POWIS AND OTHERS.

IN THE COURT OF EXCHEQUER, NOVEMBER 17, DECEMBER 13, 1826.

[Reported in *i Young & Jervis* 158.]

THE bill stated that the plaintiffs were seised in fee of several ancient freehold messuages or tenements, with the appurtenances, situate within, and holden of, the honor or lordship of Clun, in the county of Salop ; and then were, and for several years had been, in the occupation of such messuages or tenements ; and that they, and those whose estate they respectively had, as such tenants as aforesaid, had from time whereof, etc., had, and of right ought to have, common of pasture for all their commonable cattle *levant* and *couchant*, common of turbary, and also common of estovers, in, upon, and throughout a certain forest or waste, parcel of the said honor or lordship of Clun, called the Forest of Clun : that the several other tenants of the honor or lordship were entitled to the same rights. That the Earl of Powis was, and had been for many years, seised of the honor or lordship, and had lately taken upon himself to enclose, or to permit to be enclosed, certain large portions or tracts of the forest, to the detriment of the plaintiffs and the other persons entitled to commonable rights ; and that the Earl of Powis had granted the parts so enclosed to the other defendants, except the defendant Edye, who were in possession of them. That the right of the several tenants of the honor or lordship to common of pasture without stint, and to common of estovers upon the said forest or waste, was established by a decree of this court, Hil. T. 24 Eliz., her said majesty being then seised in right of the crown of the said honor or lordship. That the plaintiffs, a short time before the filing of the bill, had broken down parts of the fences of the parts so enclosed, for the purpose of exercising their commonable rights. The bill charged, that the several defendants, except the Earl of Powis, had, at the instigation of the Earl, or with his concurrence, and on some understanding that he would defray the expense, commenced actions of trespass against the plaintiffs. The bill also charged, that the defendant Edye was steward of the lordship, and, as such steward, had in his custody the books and muniments relating to the customs of the lordship and the rights of the tenants, but that he colluded with the other defendants and refused to produce them.

The bill further charged that Earl Powis and Edye had divers books, writings, etc., from which the facts stated in the bill would appear. The bill prayed that the rights of common of the plaintiffs and the other freehold tenants might be established; and that the plaintiffs and the other tenants might be quieted in such rights; that the Earl of Powis might be restrained from enclosing any part of the forest to the prejudice of the plaintiffs and the other tenants, and from obstructing or molesting them in their commonable rights; and for an injunction against the actions of trespass brought by the other defendants.

To this bill the defendants put in a general demurrer.

Temple and Richards, R. V., in support of the demurrer. The best argument against the present suit is the bill itself. Such a bill was never before filed. There are certainly some few instances of bills of peace, in cases where there have been a great many persons having the same right, and that right has been tried at law and established, to prevent multiplicity of suits. In this case there has been no trial of the right. In Queen Elizabeth's time, it was not the practice of the court to direct issues. Common of pasture without stint is illegal.

[*HULLOCK*, B. *Ex vi termini*, common of pasture without stint, means at this day common of pasture for cattle *levant* and *couchant*.]

The plaintiffs do not allege that the decree established the right to common of turbary. In *Mellor v. Spateman*,¹ the point was determined. The right to approve cannot be concluded by a decree.

Simpkinson, in support of the bill. There are many instances in which courts of equity have interfered in similar cases. The court will always interfere to avoid multiplicity of suits, by a bill in the nature of a bill of peace. On the face of this bill, no less than eight actions have been brought to try the same right. There are many cases in which bills have been filed by a lord against tenants of the manor, to be quieted in the possession of a common enclosed: *How v. The Tenants of Broomsgrove*,² *New Elme Hospital v. Andover*,³ *Weeks v. Slake*,⁴ *Arthington v. Fawkes*,⁵ and the authority of these cases was recognized by the present Lord Chancellor in *Hanson v. Gardiner*.⁶ If the bill stood on principle only, it would be singular if a court of equity, permitting a bill by the lord, would not entertain one by the tenants. But it does not rest on principle, for there are many cases in which bills have been filed by tenants. In *Tothill's Reports*, title "Common," many cases are cited, in which the court has interfered. Another authority is *Hilton v. Scarborough*,⁷ which was recognized as good law by Lord Hardwicke in *The Mayor of York v. Pilkington*.⁸ A similar principle was acted

¹ 1 Saund. 339.

² 1 Vern. 22.

³ 1 Vern. 266.

⁴ 2 Vern. 300.

⁵ 2 Vern. 350.

⁶ 7 Ves. 305.

⁷ 4 Vin. Ab. 425, pl. 35.

⁸ 1 Atk. 282.

upon by him in another case,¹ though that case was upon a different subject. [HULLOCK, B. In the cases cited by you, had not the right been established by law?] No, on the contrary, it appears, from the judgment of the Lord Chancellor in *The Mayor of York v. Pilkington*, that this was the ground of the demurrer, and that he was in the first instance inclined to allow the demurrer, but he afterwards overruled it.

The law is clearly laid down in *Lord Tenham v. Herbert*.² There the Lord Chancellor said: "Where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions at law quiet that right, he may come into a court of equity first, which is called a bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since such action would determine only the particular right in question between the plaintiff and defendant." The principle laid down in this case has been acted upon in a great many cases, which are collected by Mr. Saunders, in his note to *Lord Tenham v. Herbert*. The facts in the present bill are admitted by the demurrer, and therefore the fact, that if the common be enclosed there will not be sufficient common left, is admitted by the demurrer. The first objection taken to the bill is, that it does not pray an issue; but the bill prays the establishment of the right. The court, in overruling the demurrer, will not make any decree affecting the right, but will merely decide that the defendant ought to answer. There are many cases much stronger than the present, in which the court has said, that though the plaintiff may, and probably will, eventually fail in making out his case, yet he is entitled to an answer. On a bill the court is in the habit of making interdicts in favor of the pleader. All the cases seem to have determined, that where the right cannot be determined by one or more actions, the court will interfere on a bill in the nature of a bill of peace.³ If, with a view to prevent multiplicity of suits, the court would allow the lord to bring his bill, it would, *a fortiori*, allow the tenants. In *Arthington v. Fawkes* the court assumed jurisdiction, on the ground of approvement. Suppose two different approvements, at different periods of time, the one leaving sufficient common, the other not, there may be a right to take down the fences of the one, and not of the other. No objection arises to this bill because all the tenants are not parties to it: the general rule, that all persons interested must be made parties, is dispensed with where it is impracticable or inconvenient, as in suits by or against ten-

¹ *Poore v. Clarke*, 2 Atk. 515.

² 2 Atk. 483.

³ *Arthington v. Fawkes*, 2 Vern. 356.

ants of a manor, as for suit to a mill, or against parishioners for tithes : this principle was recognized by the Lord Chancellor in Cockburn *v.* Thomson.¹ It is unnecessary to enter into the question of approvement of turbary or estovers : they are not within the statute of Merton : and that there can be no approvement against them was decided in Fawcet *v.* Strickland.² As to the defendant Edye, he is the steward, and has the custody of the rolls and deeds of the lordship, of which the plaintiffs are not merely copyholders, but freehold tenants, and they charge him with having in his possession, not merely the rolls of the manor or lordship, but the muniments relating to the right which they claim. A *mandamus* would not lie to compel their production ; and Edye admits, by the demurrer, that he does collude with the other defendants. There is therefore clear ground for making him a party.³

Temple, in reply. Taking the right to be as laid, it is bad in law ; and allowing them to confine their right to the terms *levant et couchant*, they then establish a distinct right in each individual, which they would bind by a decision on a common right. Arthington *v.* Fawkes was not a case of separate rights ; the lord had enclosed one part of the common ; and therefore, when he had brought one action, he must have gone over the same ground again precisely. The lord would not in this case be bound as against other tenants, who are not parties to this suit. It has been said, that they have a right to the discovery of the deeds ; and that, if they have a right to part of the discovery, a general demur-
rer will not do. If they have a right as tenants of the manor, they can obtain the production by *mandamus*.

Cur. adv. vult.

LORD CHIEF BARON. This is a demurrer to a bill, commonly called a bill of peace. The cases establish that a bill may be brought by a lord against his tenants, and by tenants against the lord, in respect to rights of common. It is a bill of peace, and to prevent multiplicity of actions.

The *dicta* and cases show, that it is no objection to this bill, that the defendants may each have a right to make a separate defense, provided there be only one general question to be settled, which pervades the whole. It would be against all the cases to allow this demurrer ; it would put the bill out of court. It is not to be inferred from this, that the court will assume jurisdiction to decide any legal question without referring it to law. But until the defendant has answered, the court cannot know what the question may be. In all probability there may be one general question, as between the lord and all the tenants.

¹ 16 Ves. 321.

² 2 Comy. 578 ; Willes 57.

³ Fenwick *v.* Reed, 1 Merivale 114.

It may certainly be a question whether the lord will approve at all. It may also be a question, if he does, whether he has left sufficient common for the commoners. In the case of *Weekes v. Slake*, issues were directed. We are therefore of opinion, that the court must hear more of the case before it can ascertain what course ought to be taken. This cannot be known until the answer comes in. This pledges the court to nothing.

Demurrer overruled.

OREN A. BALLOU *v.* INHABITANTS OF HOPKINTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1855.

[*Reported in 4 Gray 324.*]

BILL IN EQUITY, filed on the 7th of June, 1853, to restrain the defendants from letting off and wasting the water in a reservoir on Mill River, situated in the towns of Hopkinton, Milford, and Upton. The bill alleged that the plaintiffs were and long had been the owners of certain real estate, mills, and water privileges for the manufacture of cotton goods, situate on or near said river, some in the town of Blackstone, and others in Cumberland (R. I.) ; that they, with other persons, were the owners of a ~~1~~ interested in said reservoir, which was created by the construction and maintenance of a dam at the outlet of North Pond in Milford, for the use and benefit of their said mills and water privileges, and by means of which they were enabled to raise, keep, reserve, and retain a head of water for the use and benefit of said mills and privileges during the dry season of the year ; that they and the other owners of the reservoir had incurred great expense in making, maintaining, and repairing the reservoir, and in purchasing land therefor, and had during the past winter and spring retained and collected a large quantity of water ; and that such water would be needed to run said mills during the coming dry season.

The bill also alleged that the defendants, pretending that the water in the reservoir, as then raised, was flowing over and upon a highway in Hopkinton, and claiming that the plaintiffs had no right to raise the water to its then height, threatened to draw off a part of the water from the reservoir (the water in the river being then sufficient to supply said mills), and were actually letting off the water, and by their selectmen had raised the gate at the reservoir dam, so that there was reason to apprehend that, unless restrained therefrom, the water, or a large part of it, would be discharged and wasted, and its accumulation prevented, be-

fore any part of it could be beneficially used or enjoyed, whereby the plaintiffs would sustain great loss and damage when they should need the water in the coming dry season.

The bill further alleged that the plaintiffs had the right to raise the water in the reservoir to its present height, that the defendants had no right to let it off, and that the plaintiffs, in 1833, at the time of the construction of their reservoir, obtained, from the owners of the land flowed, the right to flow to the present height, and had ever since exercised that right; that the water had not been retained this season to a greater height than before; and that said highway was located, laid out, and accepted in November, 1835, long after the reservoir was built; so that the defendants had no right to let off the water from the reservoir, on account of any flowing over or upon the highway, so long as the plaintiffs continued to exercise only the rights of flowage which they had so long enjoyed.

The defendants demurred to the bill, on the ground that the plaintiffs had not shown such a case as entitled them to the relief prayed for, inasmuch as it did not appear that there was any impediment to an action at law being brought by the plaintiffs to ascertain their rights and the rights of the defendants relative to the river and dam in the bill mentioned; or that, in any trial or action, the plaintiffs had obtained verdict or judgment for that purpose; or that there was, before or at the time of filing the bill, any authentic record of such right.

E. Washburn for the defendants.

C. Allen for the plaintiffs.

SHAW, C. J.¹ The only questions in the present case are, whether this court have jurisdiction in equity, to restrain and prohibit the defendants from drawing off water from the plaintiffs' reservoir, established for the purpose of supplying the several mills of the plaintiffs, on one and the same stream; and whether it is a fit case for the court to exercise that jurisdiction, rather than leave the plaintiffs to their actions at law, to recover damages for the injuries done them respectively in diminishing the water at their respective mills.

The case comes before us on a general demurrer, and therefore we are to take the facts set forth by the plaintiffs to be true, for the purpose of the present inquiry. The case set forth in the bill is alleged to consist in an injury done by the defendants to the incorporeal hereditaments of the several plaintiffs, in wasting the water which would flow to their mills when it would be useful and beneficial to them, and thereby impairing and diminishing their water power. This is technically a private nuisance, the appropriate remedy for which, at law, would be an action

¹ THOMAS, J., did not sit in this case.

on the case for a disturbance. In such action at law, the remedy would be a verdict for nominal damages for the disturbance of the plaintiffs' right; but if actual damage were proved to have been sustained, as the natural consequence of such interruption, then for such sum as would be a compensation therefor up to the time of the verdict, or of the action brought. Being by the rules of law a nuisance, we have no doubt that it is within the Rev. Sts. c. 81, § 8, cl. 8, giving this court jurisdiction in equity, "in all suits concerning waste and nuisance."¹

The other question is, whether, taking the subject of the complaint as the plaintiffs have stated it, the bill shows that the plaintiffs have such a plain, adequate, and complete remedy at law, that, according to the precedents and rules of equity, a bill ought not to be sustained, so that the demurrer is well taken to it on that ground.

Upon this question, the court are of opinion that the case shows no such adequate and complete remedy at law as to deprive them of the right of proceeding in equity, and that the demurrer ought not to be sustained. Some of the more prominent reasons for this determination are these:

Although the plaintiffs are several owners of separate and distinct mills, injured by the alleged stoppage, diversion, and waste of the water of Mill River, and to recover damages for which each owner must bring his several action at law to obtain a remedy for his particular injury, yet they have a joint and common right in the natural flow of the stream, and in the reservoir by which its power is increased, and a joint interest in the remedy, which equity alone can afford, in maintaining a regular flow of the water of the reservoir at suitable and proper times, so as best to subserve the equal rights of them all. The remedy in equity therefore would, by one decree in one suit, prevent a multiplicity of actions.

The remedy in equity would be more adequate and complete. At law, each plaintiff could recover only the damages then actually sustained, when the action is brought; whereas a decree in equity would look to the future, and prevent continuance of the injury and cause of damage, and thereby afford a more ample and complete remedy.²

In regulating the rights of mill owners and all others in the use of a stream, wherein numbers of persons are interested, equity is able, by one decree, to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties respectively; and thus it is peculiarly adapted to

¹ *Boston Water Power Co. v. Boston & Worcester Railroad*, 16 Pick. 512.

² *Boston Water Power Co. v. Boston & Worcester Railroad*, 16 Pick. 512, *Bemis v. Clark*, 11 Pick. 452.

the relief sought against such alleged nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or many suits at law.¹

Demurrer overruled.

WARRICK *v.* QUEEN'S COLLEGE, OXFORD.

IN CHANCERY, BEFORE LORD HATHERLEY, L. C., APRIL 17, 18, 20,
21; MAY 3, 24; AUGUST 2, 1871.

[*Reported in Law Reports, Chancery Appeals, 716.*]

THE bill in this case was filed by John Warrick, J. Goldsmid, W. E. Dawson, and J. Jacobs, on behalf of themselves and all the other tenants of the manor of Plumstead, in the county of Kent, as plaintiffs, against the Provost and Scholars of Queen's College, in the University of Oxford, and the Rev. W. Jackson, as defendants, to restrain the college from inclosing certain commons.

The college were the owners in fee of the manor of Plumstead, and the four plaintiffs claimed to be freehold tenants of the manor. The plaintiff Warrick was held by the Lord Chancellor to have established his title as a freehold tenant of a house and orchard which were part of the manor; but Warrick had never paid quit-rent or been admitted a tenant of the manor, and the quit-rents over the whole manor had fallen into abeyance, nor had any tenants been admitted for more than half a century. There appeared to be other freehold tenants, though one of the plaintiffs had not shown himself to be a tenant.

Within the manor are three commons—Plumstead Common, containing about 110 acres; Bostal Heath, 55 acres; and Shoulder of Mutton Green, about 4 acres.

The bill alleged that for a period of thirty years next before the acts of the college thereby complained of, and longer, the predecessors in title of the plaintiffs, and the plaintiffs, and the other freehold tenants of the manor, had enjoyed as of right and without interruption the following common rights, as to pasture for commonable cattle, appendant, and as to all other rights of pasture and other common rights, appurtenant to their several tenements held of the lords of the manor: 1. A right of pasture upon the three commons for all sorts of cattle levant and couchant, as well commonable as others, and a right to feed geese, ducks, and such like birds upon Shoulder of Mutton Green. 2. A right of estovers, and hay-bote and wood-bote and

¹ *Bemis v. Upham*, 13 Pick. 169; *Bardwell v. Ames*, 22 Pick. 333.

turbary, to cut so much turf, furze, gorse, fern, and underwood upon Plumstead Common and Bostal Heath as might be required for fuel to be consumed upon their tenements, and for purposes of fodder and litter for cattle levant and couchant on their tenements, and for other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of their tenements, and to dig so much loam, sand, and gravel upon the said commons as might be required or necessary for the beneficial enjoyment of their tenements.

3. A right to use the whole of the three commons for walking, driving, and riding on horseback, and for the enjoyment of air and exercise, and for amusement and recreation, and particularly as to Shoulder of Mutton Green, a right to use the same for all rightful village sports, games, and pastimes, and other rights, privileges, and customs.

The bill also contained allegations to the effect that in or about the year 1866 the college inclosed various parts of Plumstead Common and Bostal Heath, and inclosed nearly the whole of Shoulder of Mutton Green, and stopped up ancient paths over the common, and threatened to inclose still more of the waste, to erect houses and other buildings on the land so inclosed, or some of them.

In August, 1866, this suit was instituted, and the bill prayed for a declaration that the plaintiffs and the other freehold tenants of the lords of the said manor were entitled to the various common rights already mentioned; and for an injunction to restrain the college, their servants, agents, and workmen, from inclosing or suffering to remain to be inclosed any part of the three commons, and from in any manner disturbing or interfering with any rights of the plaintiffs and the other freehold tenants of the lords of the said manor on and over the three commons; and that the plaintiffs and the other freehold tenants might be quieted in the possession and enjoyment of their rights.

To this bill the defendants, by their answer, and at the bar, raised several defenses, which will be found stated in the arguments of the counsel and in the judgment of the Lord Chancellor.

A great quantity of evidence was produced, consisting principally of the court rolls, but also of parol evidence as to the exercise of the commonable rights claimed by the plaintiffs, the effect of which is stated by the Lord Chancellor in his judgment.

The suit came on for hearing before the Master of the Rolls, who made a decree in favor of the plaintiffs, except as to Shoulder of Mutton Green, as reported.¹

The defendants appealed.

Mr. Manisty, Q.C., Mr. Jessel, Q.C., Mr. Lindley, and Mr. Elton, for the defendants.

¹ Law Rep. 10 Eq. 105.

Sir Roundell Palmer, Q.C., Mr. Williams, Q.C., and Mr. W. R. Fisher, for the plaintiffs.

Aug. 2. LORD HATHERLEY, L.C. I have been compelled to delay giving my judgment in this case for what may appear a somewhat unreasonable time, because, although there are some broad facts which ought to suffice for the determination of the case, still it was necessary to go over, as I have done very carefully, most of the documentary evidence which is contained in the court rolls of the manor in question, and a great quantity of evidence with reference to the title of the several plaintiffs, and to the exercise by them of acts in pursuance of their rights as claimed by the bill.

This suit is to establish the title of the plaintiffs, as holding freeholds of the manor of Plumstead, to exercise for their own benefit various rights upon the waste soil of the manor, such as a right of common for their commonable beasts, and for their other than commonable beasts; a right also of estovers with respect to gorse and fern and underwood, and a right of cutting turf, which is alleged in two ways—as a common-law right of turbary, and a special right with regard to cutting the turf from the soil of the waste. The question is, whether these rights are vested in the plaintiffs in such a manner as that they can sustain a suit against the present lords of the manor, Queen's College, who have since the year 1860 controverted and denied the existence of any such rights, by issuing notices threatening with legal proceedings all persons attempting to exercise any of those rights, and who claim an absolute right to deal with the waste of the manor as they please.

That is a very broad controversy, and it certainly would be very fatal in the interests of justice if, in the face of the evidence that I have here before me, such a claim on the part of the lords of the manor could be sustained. I have before me the court rolls of this manor extending over two hundred years, from which there appears most abundant evidence of some persons (I do not at present say whom) not only having without interruption exercised all these rights which I have mentioned, but having sometimes at Courts Leet, and sometimes at Courts Baron, more often at Courts Leet with view of frank pledge, laid down rules and regulations under which these rights might be exercised by those who had a right to exercise them, whoever they might be. For more than two hundred years, whenever courts were held, we find these things always done, without any resistance on the part of the lord or any question on the part of the steward.

To contend that no such rights had existed would, of course, be hopeless on the part of the lords, and therefore their case has been that all these rights may have existed, but that the lords, as the undis-

puted owners of the soil, can, before the plaintiffs establish their rights, put them to the proof whether the right is vested in A., B., C., or D., although it may be that A., B., C., and D. have for more than two hundred years been exercising these rights.

Now, as I have said, this is a large and broad view of the case, which strikes one at first sight, and it cannot be disputed that the court is entitled, nay, bound by authority—not merely from an inclination towards any abstract rule of justice—when it finds rights which have been exercised in the manner I have described, to find the origin of them in some way if it can. If that cannot be done, the right cannot be established, however long it may have been used.

That being so, the principal controversy has in reality been, whether there has been a clear and definite exercise of these rights on the part of the freeholders of the manor, who are represented by the plaintiffs. It so happens that the manor has no copyholders ; if they ever existed, they have disappeared.

With regard to the condition of freeholders of customary manors, there can be no doubt that they are in a different position from that of copyholders. Copyholders can allege a custom in the manor, the whole of the manor being subject to the custom ; and they deal with their lord as if he had at some former time made a grant to them of certain rights. Those rights may sometimes be of a very strong and high nature, as was exemplified in the case of *Marquis of Salisbury v. Gladstone*,¹ where Lord Cranworth, in addressing the House, said, that when a custom was said to be void because it was unreasonable, nothing more was meant than that the unreasonable character of the alleged custom proved that the usage, even though it might have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times.

Now, as regards the freeholders : one right which the common law seems to give to all tenants of arable land whatsoever in freehold, is a right of common on the lords' waste for all beasts employed in agriculture, and this was not disputed by Mr. Manisty on the part of the defendants. As far as regards that right, therefore, all the freeholders would be in an exactly similar condition, and the plaintiffs would be free from some of the objections as to the frame of the suit, and from the objection as to hearsay evidence.

Then, when we look at the court rolls, we find a number of other rights exercised by somebody ; and the course of proceeding seems to have been this: The freeholders certainly were held to have a special interest in the waste, independently of the common-law right of common appendant, because although, no doubt from carelessness,

¹ 9 H. L. C. 692 ; 8 Jur. (N. S.) 625.

the rolls of the manor were not always kept in the best possible form, yet we do find, as a general rule, that when a part of the waste was to be granted, the assent of the freeholders was given, and especially where there was a grant of part of the waste for building a cottage, the assent of the freeholders to the building of that cottage was given. It is quite true that sometimes we find the parishioners assenting, and other parties also; but that can, as I shall show, be explained. We also find, from the very earliest time, entries with reference to the cutting of turf to be used for fuel:—[His Lordship then mentioned such an entry in 1688.]

Looking to the doctrine which I have found laid down in all the cases, and which no one will dispute—that we are compelled to find a legal origin for a custom of this kind if we can—we must now consider what legal origin can be attributed to this undoubted right exercised by these parties, and continued to be exercised for so long a period as from the year 1689, of making regulations and bye-laws with reference to gorse, fern, and other matters which the authorities cited seem to show can properly be made by a Court Leet respecting usages upon the common.

This brings me to what has really been the difficulty in the case, which I have anxiously considered, to see whether it could or could not be overcome, it being the duty of the court to seek a way of overcoming it, by finding, if possible, the legal origin of the right. I rather think that the difficulty arises from our somewhat artificial system of law. I am not, of course, venturing to overrule or shake any of the established authorities; but the real difficulty is this: In ancient records traces are to be found of customs (prevailing anterior, I think, to our feudal history, and belonging to a period of greater freedom), such as having lammas-fields, that is, fields which are used during a certain portion of the year by all the tenants of the manor, and during a certain other time are lying waste: also of a custom as between the whole body of those who settled upon a place and their lord, to have an equal allotment to them of land which they might hold in severalty for a certain period of the year, and have rights exercisable in common upon it during the rest of the year. So also that the inhabitants, that is to say, those who were free persons occupying houses, whether coupled with land or not (if they were not coupled with land, they would not carry common appendant), do seem as a matter of fact—and I am now speaking only of fact and not of law—to have acquired rights by which they could avail themselves of the woods for the purpose of feeding swine, and of the commons not under cultivation for their cattle; these rights sometimes extending to the cutting of turf, the digging for gravel, and the like.

But the law has said that there are two courses of dealing with such rights ; a right by custom may be claimed, which is the case of a copyholder, or a right by prescription may be claimed, which is the case of the freeholder. The freeholder stands upon the presumed grant of his freehold, and he prescribes for himself, and all those in whose interests he stands, to have the use of certain things, which for a time beyond legal memory have been attached to the land which he has as freeholder. And it has been held (and here arises the principal difficulty in this case) that inhabitants are not in a condition to prescribe, because there never could have been a grant to them, inasmuch as they are not a corporation. The plaintiffs were, therefore, rightly advised in this case in framing their suit as a suit by prescription in right of the freeholders, and not of the inhabitants.

Now let us see, whatever may, to a certain extent, seem, upon the rolls of this manor, to have been the course of dealing, whether there is not really a proper legal origin to be attributed to such right. I think I can see my way to saying that here the freeholders take by grant, which of itself carries the common appendant, and we find these freeholders, having the right to exercise these various privileges upon the waste soil of the manor, though we find afterwards a number of persons as inhabitants also exercising their rights. In this state of things, I think that the correct view is, that the right being vested in the freeholders as such, of course is exercisable not by themselves only, for it is exercisable by the tenants under them ; and therefore this body of inhabitants who are constantly brought in must have originally taken by some title or other derived from the original owner of the soil. The soil was granted out to the freeholders, who may from time to time have disposed of interests of greater or less duration, to the different persons who claimed through them as their tenants, and who exercised those privileges which the freeholders may be taken in the first instance to have acquired from the lord.

Having given this general view of the possible origin of the rights in the manor, which are to be found traced in such strong characters as having been exercised by large bodies of people, I will now proceed to the difficulty which was raised at the outset of the case as to the fraine of the suit, and the possibility of maintaining any such suit as this, in respect of the common right vested in the freehold tenants of the manor.

The argument which was pressed upon me very much by Mr. Manisty, fortified by the case of Earl Dunraven *v.* Llewellyn,¹ was that a number of freeholders could not join together as plaintiffs and

¹ 15 Q. B. 791.

assert a common right, for they had no such right at all. The persons who claim by a custom prevailing over the whole district all come under one uniform custom, but persons claiming by prescription necessarily claim by grant; and how can we tell what would appear in each grant? Each grant may have a separate right connected with it; nor could hearsay evidence be admitted, on the very ground that this was not a common right, but a case of each single person claiming by prescription. I think there is very considerable fallacy in those arguments. In the first place, as regards authority, we know there was a very well considered case of *Powell v. Earl Powis*,¹ which was before the Chief Baron Alexander, who knew as much of the pleadings of the court, I think, as any man who ever presided in a court of equity; in which case I take it that the judge, if he found that the law was adverse to the rights being put together as a common right in respect of which a suit might be maintained in this court, would have allowed the demurrer. But that was not done, and for very good reasons. What is there to prevent these persons who claim by prescription from having had a grant common to all, with perhaps different privileges contained in their respective grants? It is curious enough that in a valuable note on the case of *Earl of Dunraven v. Llewellyn*, made by Mr. J. Williams,² a grant in Wales is mentioned, by which a person granted land to certain tenants, with all the uses, privileges, and advantages which had been granted to other tenants. This is an instance of what may be possible and legal: and taking Lord Cranworth's view in *Marquis of Salisbury v. Gladstone*,³ that when you find a right of such long-continued duration you are bound, if possible, to ascribe to it a legal origin, can it be said that it would be unreasonable to hold that this right had originated in the grant to every freehold tenant of all the rights and privileges which every other freehold tenant had? That would account at once for what is found in this case. There are a number of persons exercising common rights in the face of the lord or before his steward; and in such a case I apprehend that I am bound to find that such common rights existed. It may be, of course, that the tenants had separate grants, and that a particular house was free from some claim or demand on the part of the lord from which others were not free; for instance, from quit-rent, or something of that kind. But that would not at all prevent their having certain large privileges in common with others. I take it that the view of this court is, that all persons having a common right, which is invaded by a common enemy, although they may have different rights *inter se*, are entitled to join in attacking that common

¹ 1 Y. & J. 159.

² Wms. R. Pr. 9th Ed. 480.

³ 9 H. L. C. 692.

enemy in respect of that common right. I may take an instance from modern times. There may be classes of shareholders in a railway company who have different rights *inter se*, but they may all have a common enemy in the shape of a fraudulent director, and they may all join, of course, in one common suit against that director, although after the common right is established they may have a considerable litigation among themselves as to who are the persons entitled to the gains obtained through that suit.

[His Lordship then stated what was clearly and distinctly proved by the court rolls. Rules were constantly made with reference to the different privileges, and these rules in themselves proved the existence of the privileges. From an early date certain privileges were assigned to certain persons—inhabitants—far more constantly inhabitants than others. There was clearly proved by the books, as far as they went, the ancient right and use of common for commonable cattle, and also for cattle not commonable, such as pigs. There were also proofs of a right to take estovers in the shape of furze, about which there were a great many regulations, and also of a right to cut turf for burning. These rights were asserted over and over again, and rules were laid down for their exercise, the common course being to hold the Court Leet and the Court Baron on the same day. In almost every case the customary freeholder was present, attending as one of the homage of the Court Baron on the same day on which the Court Leet was held, and a difference was made between inhabitants and freeholders in the amount of fines for non-attendance. There were also resolutions which regulated the rights of the persons who claimed to exercise rights, inflicting fines upon certain persons exercising the rights. Either the whole fine went to the lord, or half of the fine went to the lord and half to the poor of the parish. That showed, no doubt, that some customs grew up which it might be very difficult to establish as matter of right upon the part of those persons who might be disposed to assert them; but this did not show any right in the lord to prohibit acts done *de jure*. It only showed that where unlawful acts were done contrary to the rules of the manor, certain fines were inflicted; and it might well be that the lord would acquiesce in an arrangement of that kind without asserting anything against the general privilege; but there was nothing to contradict the rights of the freeholders. It was impossible to deny, upon the evidence, that persons had been let in who were not *simpliciter* freeholders; but still they were persons who might have derived title through the freeholders as their tenants. At all events, the rights were in no sense contradictory, except that there was a greater number of persons let in to partake of that which, if the freeholders alone were to enjoy it, would

give them a larger right than they had when it was participated in by others.]

As to the statute 3 & 4 Will. 4, c. 71, and the question whether there has been any interruption which might prevent the right being asserted, I do not think it necessary to inquire into that part of the case, because the prescription may be proved. The statute only applies to cases where you want to stand upon thirty years' user; but here, where the title is one of 200 or 300 years, that statute is not needed, and the title can be rested upon the original right before the passing of the statute.

There should, however, be some title besides that upon the documents; but there is really abundant evidence of that nature. It was disputed whether, in fact, it could be shown that the right here claimed to be exercised had been exercised in respect of any particular property which is now vested in any one of the plaintiffs; and on this point there was much evidence given. However, it was clear, and came at last to be admitted that, assuming that the right of the freeholder was not forfeited by his non-admission and his non-performance of suit and service, Mr. Warrick had made out a right.

Mr. Warrick has made out his claim in respect of a house with some land, and therefore there is one freeholder who has some right in that respect. And if I find but one freeholder in that condition amongst the plaintiffs, I have a person who has a right to sue on behalf of himself and all others; but there must be a trifling alteration in the decree of the Master of the Rolls in that respect, which must speak of "the plaintiff Warrick and all others who are freeholders."

Then the question is, first, whether Mr. Warrick has exercised his rights? I think it is abundantly proved that the right has been exercised with reference to commonable beasts. I am bound to take it that it has been exercised in right of that freehold which he has, if I find him exercising it at all, unless it can be clearly shown that he has exercised it in respect of some other freehold or some other property. You are bound to assume that he has exercised the right in respect of that title which you find upon the records in the court rolls. I am not sure whether every one of the rights was exercised by Mr. Warrick. I have not gone fully into that question, because I apprehend that in this particular case, when we find from the court rolls that we are justified in arriving at the conclusion, that in the prescriptive grant to the original freeholder there were included these rights which I find in the books and by the evidence of the court rolls to have been exercised from all time, then I think we arrive at a position in which there is a public right of so large a description, that the evidence of all other persons holding exactly in the same position becomes ad-

missible. As I read the case of *Earl Dunraven v. Llewellyn*,¹ it went upon the particular circumstances of the case, in which the prescriptive right which was alleged by the different persons might be wholly irrespective of any common right or common grant amongst them all. But here it is clear to me, upon the evidence, that the freehold tenants always had all these rights, which I must presume to have been granted to them at the same time and generally to all in their position. If so, there is abundant evidence that the different rights which have been alleged have been exercised.

The bill raises a question as to three places—Plumstead Common, Bostal Heath, and a third place, called Shoulder of Mutton Green. Shoulder of Mutton Green is a small place as to which the right of the people to amuse themselves arose, and the Master of the Rolls has disposed of that altogether, and, as it seems to me, quite rightly, has put that out of the case, considering that no case was made about anything done on Shoulder of Mutton Green with respect to which a decree could be asked. His decree is confined to Bostal Heath and Plumstead Common.

Having got so far as this—that I think there is a person on the record who has a right and is entitled to maintain it—there are several other defenses which I am obliged to notice. The first is that which I have just alluded to, namely, that the quit-rents have not been paid, and suit and service have not been rendered. But I apprehend that that is not forfeiture. A freehold is not like a copyhold which the lord seizes for forfeiture. In *Chichester v. Hall*,² it was decided that rights vested by way of prescription in freehold tenants would not be lost by the circumstance of their not being admitted, or not having rendered suit and service. There is no authority, certainly none was cited, for showing that a freeholder having a prescriptive right to these privileges upon the waste lost them or was deprived of them by not paying quit-rents or not performing suit and service, or that the lord was entitled to assert his rights by forfeiture. The lord has other remedies. Persons appear by the court rolls to have been fined for not coming in at the proper time to take up their freeholds, and to render their suit and service. The lord may be entitled to pursue that right, but I do not think there is anything in the non-performance of those duties which deprives Mr. Warrick of his right to insist upon the privileges which I hold that he, as tenant of the freehold, is entitled to.

Then other difficulties were raised with regard to some of the plaintiffs. The title of one Mr. Jacobs has not been shown. As to

¹ 15 Q. B. 791.

² 17 L. T. (O. S.) 12.

the other two, they are in a doubtful position ; but I think the case can stand on Mr. Warrick's title, which will entitle these plaintiffs to relief.

There is another point, which is as to the right of turbary, and it applies in some respects also to other rights. It was said that this right might extend to any new house that might be built, and I think it is impossible to say that there is not a right established of cutting turf for the use of dwelling-houses, independently of the right of turbary, which can only exist *per se*. An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or, at the most, for the house which supplies the place of that house.

The building of houses was also relied upon as destroying common appendant. I do not think that is very material here, considering the other clear commonable rights which appear to me to have been proved. As regards the mere common-law right of common appendant, the law I apprehend to be this : that if you can show—which you very rarely can do at this date—that there was no arable land at all granted when the house was granted, then the right of common appendant does not arise. If you build upon your arable land so as to cover it all up, then the question arises whether you have not entirely forfeited the right of common appendant, because you have destroyed that in respect of which it was granted, namely, the arable land, for which alone the law assumes the grant. It has been held in several cases that turning arable land into pasture would not destroy the right, because it was said that you might turn it back again; and so it was said with reference to a mere temporary building. If a person was minded to build, for a temporary purpose, wholly over that which was once arable, then that would not affect the right. But Carr *v.* Lambert¹ decides that if it is plain and clear from the act done that you mean to abandon the right, then the right is at an end.

But I hold these rights to be freehold rights granted by the lord—not simply common-law rights as to common appendant, because, of course, that would not apply to gorse, furze, turbary, and various other things ; and the question how far the rights are affected by the additional buildings, I think, does not arise—although I have had more doubt as regards the turf than upon any other point—because such rights might be unreasonably increased by the building of a whole town. I am told that streets have been built on some parts of this very place. I have satisfied myself that these bye-laws, which

¹ Law Rep. 1 Ex. 168.

seem to have been recognized authority, which were made from time to time for the exercise of all these rights, and which were made in respect of all these commonable rights, would enable persons to deal as they thought fit, if they did think fit, with the accruing difficulties. No such rules or bye-laws have been made with reference to the building upon land, and I do not think, therefore, that I ought to say that any portion of these rights, which are proved by the evidence before me to have been granted, have been destroyed by the circumstance of the buildings having been erected.

I think I have now gone through the whole of the objections which were raised to the substance of the decree. There are other objections raised to its form; and the decree might be usefully amended, without in any way affecting the really material issues raised in the cause.

I propose, as I said before, to alter the declaration, and to declare that "the plaintiff John Warrick and the other freehold tenants of the manor of Plumstead, in the county of Kent, are entitled as follows." Then I propose to alter the decree, though it is more by way of verbal criticism than anything else:—[His Lordship then specified the alterations.]

It appears to me that the appellants must pay the costs of the appeal, because the alterations which I have made are such as would have been made by the Master of the Rolls if he had been asked at the time to make them. Many of them are simple verbal alterations; but, at all events, they are not such as, I think, would cause any additional expense. The litigation has been occasioned by a high-handed assertion of right on the part of the college, who really seem to have said in effect to those who have been exercising their rights for 200 years: "You will be in a difficulty to prove how you have exercised them; we will put you to that proof by inclosing and taking possession of your property." I think, therefore, the whole expense ought to fall on those who have occasioned it, namely, those who have brought into question rights which have had so long a duration, and to which I am thankful to be able to discover (because it is the duty of the court to discover, if it can,) a legal origin.

DENNIS CADIGAN AND ANOTHER *v.* LEVI BROWN AND
ANOTHER.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER
17, 1875—SEPTEMBER 7, 1876.[Reported in 120 *Massachusetts Reports* 493.]

MORTON, J. This is a bill in equity alleging that each of the plaintiffs is the owner of a lot of land abutting on a passageway five feet wide, and, as appurtenant thereto, has a right of way over said passageway in common with others ; that the defendants have commenced to build a house at one end of the passageway, so as to narrow the width of the entrance to about four feet, and have raised the grade and filled up a part of the passageway so as to injure the access to the lots of the plaintiffs. The prayer is that the defendants be restrained from building the house, that the said obstructions may be removed, and for general relief. The defendants demur, upon the grounds that the plaintiffs are improperly joined, and that they do not state a case which entitles them to relief in equity, having a plain, adequate, and complete remedy at law.

1. The case stated is that the defendants are creating obstructions of the plaintiffs' right of way, of a permanent character. This is a private nuisance, which entitles the plaintiffs to relief in equity, unless they have a plain, adequate, and complete remedy at law.¹ The injury to the plaintiffs is permanent and continuous, and a judgment for damages would not furnish them adequate relief. It is true that, in an action of tort for the nuisance, they might also obtain a judgment that the nuisance be abated and removed.² But the power of a court of law can go no further than to remove the nuisance, while a decree of a court of equity may restrain the continuance or repetition of the nuisance, and may in other respects be modified and adapted to the case so as to secure the rights of both parties.³ The remedy at law, therefore, is not equally efficacious, and does not defeat the jurisdiction in equity given this court in suits concerning nuisances.

2. The other ground of demurrer is that the plaintiffs are improperly joined. The bill shows that each of the plaintiffs owns a lot abutting on the passageway, by a separate and independent title. They derive

¹ Gen. Sts., c. 113, § 2, cl. 9; *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Fall River Iron Works Co. v. Old Colony Railroad*, 5 Allen 221; *Hartshorn v. South Reading*, 3 Allen 501.

² Gen. Sts., c. 139.

³ *Boston Water Power Co. v. Boston & Worcester Railroad*, 16 Pick. 512.

their titles from different grantors. Undoubtedly, in a suit at law for the nuisance, they could not properly join. But the rule in equity as to the joinder of parties is more elastic. Generally, when several persons have a common interest in the subject-matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs. Thus in *Parker v. Nightingale*,¹ the plaintiffs, being several owners of lots in Hayward Place, each lot being held subject to the restriction that no buildings should be erected thereon except for dwelling-houses, joined in a suit to restrain the defendants from violating the restriction. So in *Ballou v. Hopkinton*,² several owners of mills upon a stream joined as plaintiffs in a bill in equity to restrain the defendant from diverting and wasting the water of a reservoir, and to equalize the flow of water in the stream. Indeed, in the latter case the court assign, as one of the reasons for holding jurisdiction in equity, that at law each owner must bring a separate action to obtain a remedy for his particular injury, and thus the remedy in equity prevents a multiplicity of suits.

In the case at bar, the plaintiffs, though they hold their rights under separate titles, have a common interest in the subject of the bill. They are affected in the same way by the acts of the defendants, and seek the same remedy against them. There is no danger of confusion in the trial, or of injustice to the defendants, from the joinder of the plaintiffs ; but the rights of all parties can be adjusted in one decree, and a multiplicity of suits is prevented. We are therefore of opinion that this ground of demurrer cannot be sustained. The same rule was held by Chancellor Walworth in *Murray v. Hay*,³ which cannot be distinguished in principle from the case at bar.

Demurrer overruled.

C. Robinson, Jr., for the defendants.

J. A. Maxwell for the plaintiffs.

¹ 6 Allen 341.

² 4 Gray 324.

³ 1 Barb. Ch. 59.

LORD TENHAM v. HERBERT.

IN CHANCERY, BEFORE LORD HARDWICKE, C., DECEMBER 17, 1742.

[Reported in 2 Atkyns 483.]

THE plaintiff brought his bill, in order to establish a right to an oyster fishery, and to be quieted in the possession of it, against the defendant Herbert, who claims the piece of ground where this fishery is, as belonging to his manor.

The defendant demurred to this bill, as it is a matter properly triable at law.

LORD CHANCELLOR. Undoubtedly there are some cases, in which a man may, by a bill of this kind, come into this court first; and there are others where he ought first to establish his right at law.

It is certain, where a man sets up a general exclusive right and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, which is called a bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant.

As to the case of the corporation of York and Sir Lionel Pilkington, the plaintiffs there were in possession of the right of fishing upon the river Ouse, for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law.

But where a question about a right of fishery is only between two lords of manors, neither of them can come into this court till the right is first tried at law.

Lord Tenham does not charge in this case any possession for the last thirty-eight years, so that this is in the nature of an ejectment bill; the plaintiff says, that this piece of ground *aqua cooperata* belongs to him; Mr. Herbert insists it belongs to him; so that this may very properly be determined at law, as it is a mere single question, to try the right between two persons; and it is not like the case of the corporation of York, who must have gone all round the compass to have come at their right at law.

Therefore the demurrer must be allowed.

BEST v. DRAKE.

IN CHANCERY, BEFORE SIR WILLIAM PAGE WOOD, V. C., FEBRUARY
26, 1853.

[*Reported in 11 Hare 369.*]

THE plaintiff had become the purchaser of some leasehold houses, which were let to tenants at weekly rents. The purchase had been completed, the assignment executed, and he had entered into possession, when the vendor, who had sold the premises as executor under a will, endeavored to recover possession of the property, and for that purpose brought an ejectment against the plaintiff, and was nonsuited in the action. He subsequently distrained upon the tenants for alleged arrears of rent, seizing in some cases their goods, and in others receiving money from them as payment. The plaintiff proceeded against the defendant for these acts by summons before a magistrate, who ordered the goods which had been taken to be restored. The defendant, nevertheless, persisted in issuing distress warrants against the tenants of the property, claiming as landlord to be entitled to subsequent rents; and the plaintiff now filed his bill, praying that he might, by the decree of the court, be quieted in the possession of the property, and that the defendant might be restrained by injunction from distraining upon or taking away the goods, or otherwise molesting, annoying, or interfering with the tenants of the said leasehold messuages.

Mr. Sheffield moved *ex parte* for the injunction, and submitted that the plaintiff was entitled to the aid of the court, such being the relief afforded upon a bill of peace.

VICE-CHANCELLOR. I am not aware of any authority for an application of this nature. The plaintiff is the owner of the legal estate, which is vested in himself, and he has, upon the strength of that estate, successfully resisted an ejectment. The court is asked to interfere for the purpose of preventing annoyances to property by a mere stranger,—a protection which there are other jurisdictions perfectly competent to afford. It is not in such a case that a bill of peace is applicable. Such bills, which it is said may be brought to quiet possession after a right has been repeatedly determined at law, stand upon a different footing. In a recent case before the Lords Justices (a dispute between several gas companies at Sheffield), their lordships refused to interfere by way of injunction, although annoyance and injury of the most serious kind were alleged to be taking place, and to be apprehended.

Motion refused.

MUSSELMAN v. MARQUIS.

IN THE COURT OF APPEALS OF KENTUCKY, APRIL 18, 1866.

[Reported in 1 Bush 463.]

G. W. Craddock for appellant.

Judge HARDIN delivered the opinion of the court :

The purpose of this suit in equity was to restrain the appellee by an injunction from the commission of trespasses and injuries on the property of the appellant by throwing down and removing the fencing of a tract of land owned by him and in his possession.

The petition alleges that the defendant had already repeatedly thrown down the fencing, and, on one occasion, had removed a portion of it and converted it to his own use, and that he had announced his intention to continue the commission of like trespasses ; that the defendant was insolvent, and would, as the plaintiff believed, continue to destroy and throw down his fence and haul off the rails, unless enjoined from doing so ; and that, by a continuance of said trespasses and injuries, great and irreparable injury and damage would be done him.

An injunction was temporarily granted on the filing of the petition. The defendant, without controverting the statements of the petition, appeared and moved the court to discharge the injunction ; and while this motion was under advisement, the plaintiff produced and offered to file an amended petition, setting forth additional reasons for apprehending a continuation of the wrongful acts of the defendant complained of in the petition.

Upon an objection of the defendant, the court refused to allow the amended petition to be filed, and discharged the injunction and dismissed the action.

It must be inferred that the amended petition was rejected on the supposition that the facts therein disclosed did not, in conjunction with the averments of the petition, constitute a ground of relief by injunction.

The uncontested statements of the petition and amended petition seem to us to disclose a malignant determination on the part of the appellee to persist in harassing and injuring the appellant by trespasses on his property, while his insolvency would prevent the redress which the law would otherwise afford to the appellant.

The appeal, therefore, involves the inquiry whether a court of equity can, in any case, interfere to prevent the commission of mere trespasses to property.

Although the provisions of section 299 of the Civil Code, to which

we have been referred, do not, in our opinion, enlarge the general jurisdiction of the Chancellor to restrain the commission or continuance of an act which would produce irreparable injury to the plaintiff; and though, as a general rule, as intimated by this court in the case of the Trustees of Paris *v.* Berry,¹ the Chancellor will not enjoin a trespass, yet where, as in this case, according to the facts alleged, the plaintiff has cause to apprehend the commission of repeated and successive trespasses by an irresponsible party—from whom no adequate compensation can be obtained in an action at law—it seems to us there can be no doubt of the power of a court of equity to interpose.

In Story's *Equity Jurisprudence*² it is said, in reference to this class of cases: "If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in the country."

Indeed, without regard to the alleged insolvency of the defendant, as the other facts alleged disclose a determined purpose on his part to persist in perpetrating the unlawful acts complained of, thus rendering redress at law only obtainable by a multiplicity of suits, and, probably, without any sufficient compensation for the vexation, expense, and trouble attending their prosecution, we are of the opinion that the Chancellor had power to enjoin the mischief, in order to prevent oppressive litigation—the principle of equitable jurisdiction being, that where there is no adequate remedy at law, the Chancellor must take jurisdiction, or otherwise the damage would be irreparable.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

WILLIAM A. WHEELOCK, RESPONDENT, *v.* MICHAEL
NOONAN, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 17, 1888.

[Reported in 108 *New York Reports* 179.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 6, 1886, which affirmed a judgment in favor of plaintiff entered upon a decision of the conrt on trial at Special Term.³

This action was brought to compel defendant to remove from cer-

¹ 8 J. J. Marshall 483.

² Vol. 2, sec. 928.

³ Reported below, 21 J. & S. 286.

tain lots belonging to plaintiff, situate in the city of New York, a quantity of rocks or boulders placed thereon by defendant.

The material facts are stated in the opinion.

L. Laflin Kellogg for appellant.

George A. Strong for respondent.

FINCH, J. The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots in the upper part of the city of New York a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them ten or fifteen feet long, and piled to the height of fourteen to eighteen feet. This conduct was a clear abuse of the license and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct and ordered him to remove the rocks to some other locality. The defendant promised to do so, but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land.

The court found as matter of law from these facts that the original permission given did not justify what was done either as it respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring and the demand for the removal of the rock the defendant was a trespasser, and the trespass was a continuing one which entitled plaintiff to equitable relief; and awarded judgment requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court. The sole question upon this appeal is whether the relief granted was within the power of the court, and the contention of the defendant is mainly based upon the proposition that the equitable relief was improper since there was an adequate remedy at law. The plaintiff objects that no such defense was pleaded. If it arises upon the facts stated in the complaint, it can scarcely be said to be new matter required to be stated in the answer, and I doubt whether under the present system of pleading the technical objection in such case is good. It is better, therefore, to consider the defense which is interposed.

One who would justify under a license or permission must bring his acts within the terms of the license. He exceeds them at his peril. There is no equity in allowing him to strain them beyond their fair and reasonable interpretation. The finding shows permission asked for "a few stone," described as "a portion" of what defendant was getting from the boulevard. The plaintiff was justified in inferring that for the bulk of his stone the defendant had a place of deposit and only wanted additional room for a small excess, for a few stone. Under this permission defendant was not justified in covering six lots with heavy boulders to a height of fourteen to eighteen feet. The thing done was gravely and substantially in excess of the thing granted, and the license averred does not cover or excuse the act. Beyond that the permission extended only to the spring of 1880 and expired at that date. The immediate removal of the stone was then demanded, and from that moment its presence upon plaintiff's lands became a trespass, for which there was no longer license or permission. Such parol license, founded upon no consideration, is revocable at pleasure, even though the licensee may have expended money on the faith of it.¹ And this was a continuing trespass. So long as it lasted it incumbered the lots, prevented their use and occupation by the owner, and interfered with the possibility of a sale.

It is now said that the remedy was at law; that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way.² And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of *Uline v. New York Central and Hudson River Railroad Company*³ demonstrates upon abundant

¹ *Murdock v. Pros. Park & Coney I. R.R. Co.*, 73 N. Y. 579.

² *Beach v. Crane*, 2 N. Y. 86, 97.

³ 101 N. Y. 98.

authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass, new actions following on in succession would have to be maintained. But in a case like the present would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental value of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages and continue his occupation, and, if there were no other adequate remedy, defiantly continue such occupation, and, in spite of his wrong, make of himself, in effect, a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it, is not adequate to redress the injury, or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, *die de diem*, for the renewed damages flowing from the continuance of the trespass; and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided and especially under circumstances like those before us. The rocks could not be immediately removed. The court have observed that peculiarity of the case and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions.

For reasons of this character it has very often been held that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the Murdoch Case (*supra*), and the rule deemed perfectly settled.

That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the Uline Case.¹ In one, stumps and stakes had been left on plaintiff's land, and in the other buttresses to support a road; in each an action of trespass had been brought and damages recovered and paid; and in each, after a

¹ Bowyer *v.* Cook, 4 M. G. & S. 236; Holmes *v.* Wilson, 10 A. & E. 503.

new notice to remove the obstruction, a further action of trespass was brought and sustained. So that, as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, but that rule has its exceptions.¹ Where the facts are in doubt, and the right not clear, such undoubtedly would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction.

In *Avery v. New York Central and Hudson River Railroad Company*,² to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked; those of a continuing trespass the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

MECHANICS' FOUNDRY OF SAN FRANCISCO, APPELLANT, *v.* JOSEPH E. RYALL, RESPONDENT.

IN THE SUPREME COURT OF CALIFORNIA, APRIL 24, 1888.

[Reported in 75 *California Reports* 601.]

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The action was brought to restrain the defendant from trespassing into and upon the foundry of the plaintiff. The allegations of the original complaint are stated in the former opinion, reported in 62 Cal. 416. The further facts are stated in the opinion.

Manuel Eyre for appellant.

R. Percy Wright for respondent.

¹ *T. & B. R.R. Co. v. B. & H. T. R.R. Co.*, 86 N. Y. 128.

² 106 N. Y. 142.

BELCHER, C. C. This action was brought to obtain an injunction restraining the defendant from doing certain acts complained of by plaintiff. The case was before this court on a former appeal, and it was held that the complaint, as then framed, did not state facts sufficient to constitute a cause of action.¹ The allegations of the complaint are set out in the opinion. When the case went back to the Superior Court, an amended complaint was filed, and to that a general demurrer was interposed and sustained. Plaintiff declined to further amend its complaint, and thereupon judgment was entered dismissing the action.

The additional allegations in the amended complaint are :

"That an action at law will be wholly inadequate to protect this plaintiff; that a continuance of such acts—and defendant announces his positive determination so to continue them each day—will work irreparable injury to this plaintiff; that if not restrained, such acts will, before it will be possible to obtain a decision in an action at law, work irreparable injury to this plaintiff, and utterly ruin its business.

"That said defendant is utterly unable to respond in damages; that he is impecunious and totally without means; that pecuniary compensation for the actual damages from day to day will not afford adequate relief, nor prevent the continuance of said intrusions, and restraint is necessary to prevent multiplicity of suits."

It was alleged in the original complaint that defendant was a stockholder in the corporation plaintiff, and in the amended complaint that he was a stockholder and director of the corporation. This allegation was stricken out of the amended complaint, but on whose motion or for what reason it was done does not appear. If defendant was in fact a stockholder and director of the corporation, it is not easy to see how he could be called a trespasser for doing the acts complained of. But however this may be, before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable in its nature. And it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so.

"The mere allegation that irreparable injury will result to the complainant unless protection is extended to him is not sufficient; the facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded."²

¹ 62 Cal. 416.

² *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Waldron v. Marsh*, 5 Cal. 120; *Turnpike Co. v. Supervisors of Yuba*, 13 Cal. 190; *High on Injunctions*, 2d ed., sec. 722.

Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent. Other facts and circumstances must be shown before the extraordinary remedy of injunction can be invoked.

"The fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin his acts, where the other circumstances of the case preclude it."¹

There may be other efficient means of preventing the commission of the threatened trespass, which can be availed of without any violation of law, and if so, such means should first be resorted to. In the case last above cited, where an injunction was asked to restrain trespassers, it was said : "If these men are not responsible for their acts in damages, we should suppose they might be crowded out of the way by a *moliter manus imposuit*."

Many cases might be mentioned where this rule would be applicable. For example, if one should discharge his cook or a clerk in his store, and the cook or clerk should return and insist upon his right to occupy his former place in the kitchen or at the counter, and should threaten to continue to do so every day, to the exclusion of any other cook or clerk, no one would think it necessary to ask for an injunction to stop the intrusions, or that a court of equity would grant the relief if it were asked for.

We see no reason why the same rule should not be applied here. If the defendant had no right to enter and occupy a place in the plaintiff's foundry, it would seem that he might easily have been stopped at the door, or, having entered, have been put out by calling in a policeman if necessary.

In our opinion, the demurrer was properly sustained, and the judgment should be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

¹ Centerville & A. T. Co. *v.* Barnett, 2 Ind. 536; High on Injunctions, 2d ed., sec. 701.

LADD *v.* OSBORNE.

IN THE SUPREME COURT OF IOWA, JANUARY TERM, 1890.

[Reported in 79 Iowa 93.]

THIS is an action in equity by which the plaintiff seeks to restrain the defendants from opening fences upon plaintiff's land, and travelling across the same, upon a claim made by the defendants that there is a public highway over and upon the premises. There was a full hearing upon the merits, and a decree was entered for the plaintiff. Defendants appeal.

J. A. Gallaher and Timothy Brown for appellants.

Head & Smith for appellee.

ROTHROCK, C. J. I. It is averred in the petition that the defendant, W. D. Osborne, "has unlawfully entered upon and travelled over the said premises, and has thrown down, torn out, and cut the fences surrounding the described premises belonging to your petitioner herein, although notified repeatedly to desist from so doing; that, in spite of the remonstrations of said plaintiff, the said defendant herein has continued to throw down, tear out, and cut said fences, and travel over the said premises, belonging to said plaintiff, and has threatened to commit other and further trespasses on said real estate, and eject your petitioner from a portion thereof, to his annoyance and damage, and to the disturbance of his rights in and to said premises." It is further averred in the petition that the defendant is insolvent, and that the injury which will result from the threatened acts of the defendant will be irreparable. Other persons were made parties defendant to the action by an amendment to the petition, but they were either members of defendant Osborne's family or had no real interest in the controversy. The defense was made by W. D. Osborne alone.

It is claimed that the proof does not establish the fact that the defendant repeatedly opened the fences and travelled across the premises, and that it affirmatively appears that he is not insolvent, and that there is no ground for equitable interference by injunction for what was merely an action at law for trespass. The right to an action in equity, restraining the removal of fences and opening up highways, the cutting down of shade trees, or any other threatened invasion, use or occupation of the land of another, has been too long established in this State to be now called in question. In *City of Council Bluffs v. Stewart*¹ it was said that "courts of equity will, under certain circum-

¹ 51 Iowa 385.

stances, interfere by injunction to prevent trespasses upon real estate ; but to authorize such interference there must exist some distinct ground of equitable jurisdiction, such as the insolvency of the party sought to be enjoined, the prevention of waste or irreparable injury, or a multiplicity of suits." See, also, *Bolton v. McShane*,¹ and cases there cited. In the case at bar the evidence shows that there had been for some time contention between the parties as to whether a public road existed over plaintiff's land. The defendant contended that there was a public highway, and he more than once opened the plaintiff's fences, and travelled over the land, and threatened to continue to do so. The plaintiff was not required to institute an action at law for every act of trespass, but, to avoid a multiplicity of suits, it was his right to have relief in equity by injunction, regardless of whether the defendant was solvent or insolvent.²

¹ 67 Iowa 207.

² A portion of the opinion not dealing with the question of jurisdiction has been omitted.—ED.

CHAPTER III.

BILLS OF INTERPLEADER.

METCALF v. HERVEY.

IN CHANCERY, BEFORE LORD HARDWICKE, C., JUNE 9, 1749.

[Reported in 1 Vesey 248.]

DEMURRER to a bill, which was founded on a rumor, that there was issue by Lady Hanmer; which issue was suggested to be entitled to the estate in question; and praying that if there was any such person, he might interplead with the defendant, and also praying an injunction to stay proceedings in ejectment by defendant, and to any action for mesne profits.

Two causes for demurrer were assigned. First for the insufficiency of the affidavit annexed to this bill of interpleader, in not saying it was at the plaintiff's own expense, as well as that there was no collusion with the defendant. The second, that no case was stated to entitle to any relief so as to oblige the defendant to put in an answer: that in a bill of interpleader it must be shown, that the plaintiffs are in danger of paying rent a second time; and that such bill on demurrer will be taken strongest against the party whose bill it is.

For plaintiffs. This is not a mere bill of interpleader: it praying something further. There is another person to interplead with, although the plaintiffs cannot find him out; like the case of another defendant's being beyond sea. Where it is doubtful whether a person is dead or not, the court has compelled security to be given if he appear not to be dead. The court has prescribed no particular form of affidavit, but in general that there is no collusion.

LORD CHANCELLOR. This is a very particular case; but as it is a general demurrer to the whole bill, if there is any part, either as to the relief or discovery to which the defendant ought to put in an answer, the demurrer being entire, ought to be overruled.

As to the first cause of demurrer, there is no such rule of court; the material part of the affidavit being that the plaintiffs should swear

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demurrer ruled.

that they did not collude with any of the defendants ; whereas the requiring to swear, it is at their own expense, goes farther ; and such an affidavit would require the denying it even in cases where a person may bear the costs of suit without being a maintainer : as a father furnishing the expenses of a suit on a bill by his son.

As to the second cause ; the bill is in two lights. First, supposing it an interpleading bill ; secondly, supposing it not ; whether there is any other ground ?

As to its being an interpleading bill, it is of the first impression ; not averring that there is any such person as can interplead with the defendant ; nor should I be willing to allow new inventions in bringing bills of interpleader : which might be dangerous ; as they are formed in some measure as interpleader at law : in which it must be shown to be between persons *in rerum natura*. One thing indeed occurs, viz. : suppose a guardian, having the infant in his custody, conceals, and will not produce him, but sets up a title to himself ; and the infant is the person suggested to have right to controvert that title ; in such a case, and so charged, I will not say, but such a bill might be brought, and to compel the guardian to produce him.

But whether that be the present case or not, the ground I go on is the other part ; not only praying to interplead but for an injunction ; which cannot be founded on a bill of interpleader as to the ejectment : as such bill cannot be as to the possession, but must be as to the payment of some demand of money. The question comes to this ; whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out, and see, whether that title be not in some other. I am of opinion he may, to enable him to make a defense in ejectment, even considering him as a wrong-doer against everybody. As to the prayer for an injunction to an action to mesne profits, it appears from the case, that if there be such a child *in rerum natura*, he must be an infant, and then the plaintiffs are in a different light, than if he was of full age. None can have an action for mesne profits, unless in case of actual entry or possession ; for which no pretence exists here ; and every person possessing the estate of an infant after his title accrued is considered here as guardian to him.

Then even supposing the interpleading part of the bill, which I am not willing to allow, to be out of the case, and considering it as a bill for the discovery of the defendant's title to possession of the estate, and to the rents and profits ; the plaintiffs are entitled to that discovery ; and the defendant having demurred to the whole bill for discovery as well as relief, it ought to be overruled.

DUNGEY v. ANGOVE AND OTHERS.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., JANUARY 24,
27, AND 28, 1794.

[Reported in 2 Vesey, Junior, 304.]

IN 1778 Dungey being in possession of premises belonging to Angove took a lease from him for twenty-one years. Under that lease he paid rent eight or nine years, till notice of ejectment was served upon him under a title of Hernal adverse to that of his landlord. This ejectment was nonprossed: but the tenant on account of it refused to pay any more rent; and filed a bill of interpleader. The answer of Hernal was taken without oath. The case he set up by his answer was, that though the legal estate was in Angove, yet it appeared by a decree in another cause, that after certain incumbrances discharged he would stand as trustee for Garveth; and that Hernal had a *post obit* of Garveth accompanied with a demise of the land. It appeared in the course of the cause that Hernal had sold his claim to Stephenton, who was not a party, but acted as solicitor for the plaintiff. The rent had been paid into court by the tenant. The affidavit, on filing the bill, was not in the usual form; but to this effect: "that the bill annexed is not with the consent, knowledge, or combination, of either of the defendants therein mentioned; but merely of this deponent's own free will." Upon the opening the Lord Chancellor expressed his surprise at this bill; which he said ought to be dismissed with costs upon the face of it; being an interpleading bill brought by a tenant under a lease against his landlord; because a stranger set up a title adverse to the landlord.

For the plaintiff. The tenant would be liable to an action of trespass for his enjoyment.

LORD CHANCELLOR. Then he will bring an action against his landlord upon the covenant in his lease. I can conceive a tenant entitled to bring such a bill, where two persons dispute which is the representative of the lessor; but in this case how monstrous a thing would it be, if it was in the power of the tenant to make the landlord, at law the defendant in the ejectment, disclose his title by an interpleading bill! I shall desire, when all the circumstances are stated, to be furnished with a ground to believe I am not acting criminally in hearing a bill of interpleader filed by a tenant admitting he holds under a lease, and calling the lessor into this court to question that title which he has acknowledged by accepting the lease, merely on a suggestion of a stranger making title. *The only case in which a tenant can come into this court upon such interpleading bill is, where the lessor has* *by interpl. to a culprit his servant, who is a* *tenant, and* *set back an* *adverse* *claimant* *from holding* *title* *to the* *land,* *and* *become a* *plaintiff* *also*

done some act himself to embarrass the tenant; which is the case of a mortgage.

Solicitor-General and *Mr. Shooter* for the plaintiff.

In *Field v. Todd* the plaintiff, who was a packer, did not upon the bankruptcy of Dewhurst return the goods to Hill, who had delivered them to him to be packed for Dewhurst; which he ought to have done upon the principle now stated. It was held, that he need not look to the title; but being an innocent holder ought not to be doubly vexed, and that the question ought to be agitated between the parties themselves. The court has done the same in the case of tenants of estates, even where the tenant occupies by demise of one person, and a claim is made by another. *Wood v. Kaye* before Lord Thurlow is not to be distinguished from this. There a house was devised to trustees for the separate use of Mrs. Kaye, with a provision for the rent to be paid to the person to whom she should give a letter of attorney. The trustees not acting, Mr. and Mrs. Kaye entered. In 1783 they executed a lease to Wood for seven years, if she should so long live. In 1787 the trustees at the instigation of her son insisted, that as the estate was devised to them, they had a right to receive the rent and apply it to answer repairs on other parts of the estate; and they gave notice to the tenant not to pay. In consequence of his refusal the lessor proceeded upon the lease; and the tenant filed a bill. It was insisted, as it is now, that a person who had taken a lease from another could not file such a bill. The Chancellor said, it would be the most detrimental thing to the public and to tenants; because nothing can be more material than that tenants shall be safe in the occupation of the estate; that if the landlord has a complete title, he may indemnify them; but that if he does not take care of the defense, the consequence is, the tenant has a right to come into equity. In *Surry v. Lord Waltham*,¹ under the will of Mr. Olmius, Lord Waltham conceived himself to be absolutely entitled to an estate in Essex. He had let two farms to Surry. A person claimed under the will, insisting that his wife was the legitimate daughter of the devisor, and threatened an ejectment. Lord Waltham calling for his rent, the tenant filed a bill of interpleader. The injunction was continued to the hearing, the rent being paid into court. Both these cases were cited when this cause came before Lord Thurlow upon the question, whether the injunction should be continued; and Lord Thurlow affirmed what he had done, and directed the injunction to be continued on paying the money into court. The circumstance, that the plaintiff had taken by demise from the defendant, occurred in both those cases. *Aldrich v.*

¹ 28th Feb., 1785.

Thompson was before both Sir Thomas Sewel and Lord Thurlow. It is reported upon the original hearing, 2 Bro. C. C. 149. Persons having rent-charges distrained upon the tenants. They filed a bill of interpleader. It was insisted, they had no right to do so; whatever right they had to an indemnity. Sir Thomas Sewel thought they could not file the bill; but Lord Thurlow ordered the rent to be brought into court. In *Brimer v. Buchanan*,¹ the plaintiff had received several sums of money from government for corn shipped for the public service. He filed a bill against several persons who set up claims. One claimed in respect of the freight of the corn; which would have been answerable for the freight. It was insisted, he had no right to file the bill; for that he was bound to account with those under whose authority he acted. Lord Thurlow thought otherwise; that the money having come actually to his hands from government, though under an authority that ought not to be acted upon, he was liable; and therefore might file the bill.

LORD CHANCELLOR. In all these cases the party has a right to the specific money; but the case of a tenant who disavows his landlord is different. He never can be called upon to pay the rent to the other person. While the tenant is bound by contract to pay to Angove, Hernal may eject him; and may bring an action for use and occupation; but he never can for the rent. It is a different demand. The parties interpleading must each in supposition have a right to the same demand. Here that cannot be set up; for an action for the rent he never can have.

For the plaintiff. It will be in effect the same action.

LORD CHANCELLOR. Where there is a demise, an action for use and occupation cannot be brought by the lessor; but it must be upon the deed for the rent. If another person claims, he may bring an action for use and occupation. The case of *Wood v. Kaye* is very right; and directly opposite to this. The title of the trustees was derivative from that of the *cestuy que trust*; and was consistent with it. The tenant did not come to disavow the title of the landlord. It was a question between trustees and the *cestuy que trust*; with which the tenant had nothing to do. The rights of the trustees and *cestuy que trust* stand on the same foundation. So *Aldrich v. Thompson* was a clear case of interpleader; for the annuitants were claiming their rights by contract with a person they had permitted to continue in possession of the estate.

Attorney-General and Mr. Hollist for the defendant Hernal.

The parties have acquiesced in treating this as a case of interpleader.

¹ 28th Nov., 1788.

The plaintiff is only to bring the parties to a hearing. If a person is seized of an equity of redemption, has made a lease, and give notice not to pay rent to the mortgagee, but to himself, the tenant may file a bill of interpleader if the landlord refuses to indemnify him. If the mortgage is subsequent to the lease, the tenant is involved in the dispute by the act of the mortgagor. A question may arise, whether the mortgage is paid or not. In another cause it appears that this is a case of that sort. The defendant Angove having submitted to this case from time to time, and suffered an injunction to go and be sustained, his conduct has operated in fact to remove the necessity of applying for a receiver in that other cause. This cause never would have had the effect it has, if the other defendant had either demurred or moved to dissolve the injunction. But as the money is in court, the court will retain it till the report in the other cause. After what has been said, I shall only cite 2 Com. Dig. Chancery (3 T.) and Gilb. For. Rom. 48, where after stating what bills of interpleader are, he says, "there are other bills of interpleader likewise; as when two persons claim the rent of tenants, there the tenants may prefer an interpleading bill against both of them, etc."

Mr. Mansfield, Mr. Lloyd, and Mr. Simeon for the defendant Angove.

There never was an instance of such a bill. There was a case before Lord Kenyon when Master of the Rolls, which supports the opinion the court has already thrown out. A as attorney for B was employed to recover a debt. A accepted a bill for B which, though not intended to be negotiable, was transferred. B being an uncertificated bankrupt, his assignees claimed the money in the hands of A. A person also claimed as *bona fide* holder of the bill without notice. A filed a bill of interpleader. Lord Kenyon dismissed the bill, being of opinion that none but a mere stakeholder could file such a bill; and that when a man had expressly contracted with either of the parties, as in that case by the acceptance, he could not. In *Metcalf v. Hervey*,¹ Lord Hardwicke expressly lays it down, that such bill cannot be as to the possession; but must be as to the payment of some demand in money. That is a direct authority that there cannot be a bill of interpleader to stop an ejectment. If any collusion appears in any part of the proceeding, the court will make no decree. It is plain they are colluding, from the circumstance of taking the answer of Hernal without oath, and from the unusual form of the affidavit. Stephenton, the party really interested, is not before the court; therefore there is a defect of parties; and in that case the court may dismiss the bill. The

¹ 1 Ves. 248.

plaintiff could not have been hurt by Hernal if he had paid rent to Angove. Hernal could not have distrained, or maintained an action for use and occupation. Upon the motion to dissolve the injunction nothing was said about the right to support this bill upon the merits. It was thought premature. The motion was to dissolve the injunction, because the plaintiff had not brought the money into court. The Chancellor was so struck with that circumstance, and the circumstances of collusion, of which he was then informed, that he said, he thought no man could have an injunction upon a bill of interpleader without bringing the money into court in the first instance ; and he thought the bill might be dismissed for want of it ; and directed a motion to be made for that purpose. When the other motion was made, it was insisted that according to the practice the money might be brought in at any time ; and that did finally appear to be the practice. But it was understood that the injunction could not be continued without bringing the money into court.

Reply.

The rule cannot be according to the case before Lord Kenyon. I believe the question there was simply, whether the person who brought the bill had not by his acceptance made himself liable in a way that made the demand of the innocent holder clear ; who must be paid at all events ; and any consequence attending the plaintiff he must suffer. But if the question had been agitated between the bankrupt and his assignees, which is precisely this case, the bill would have lain. The attempt to confine interpleader to cases of mere bailment is absurd ; for in that case it may be compelled at law. But the cases here are, where it cannot be compelled at law for want of privity between the persons claiming. If a person comes to property by the bailment of two, or if he finds property claimed by two, he need not come into equity. If the bill does not state a sufficient ground of interpleader, that ought to be taken advantage of by demurrer, not at the hearing. The form of the affidavit cannot be taken advantage of at the hearing. By submitting to answer they waive that objection. This often happens in the case of a lost deed : advantage cannot at the hearing be taken of the want of the affidavit. Here Angove has submitted to discuss with Hernal the nature of his claim.

LORD CHANCELLOR. When this cause was first opened, it struck me as a singular and perfectly new attempt. I had imagined that nothing was better known, or more firmly established, though the particular authority for the position did not occur to me, than that there was no possibility of filing a bill of interpleader against an ejectment : the particular case has been mentioned, in which Lord Hardwicke held that opinion. That was a bill of interpleader brought with

the same sinister purpose as this to draw out a discovery of some facts relative to the title of the Hanmer estate; and Lord Hardwicke lays it down expressly, though upon the complicated state of that case he granted the injunction, that upon the case of ejectment, where possession is the question, there can be no bill of interpleader. The reason is manifest; for upon the definition of it, a bill of interpleader is, where two persons claim of a third the same debt or the same duty. With regard to the relation of landlord and tenant the right must be the object of an ejectment. The law has taken such anxious care to settle their rights arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place. If the landlord does not defend for him, he recovers upon his lease a recompense against the landlord. In the case of another person claiming against the title of his landlord it is clear, unless he derives under the title of the landlord he cannot claim the same debt. The rent due upon the demise is a different demand from that which some other person may have upon the occupation of the premises. Upon the view I now have of this case, it would be a small matter upon the justice due to the rights of the country merely to dismiss the bill: I must make it a subject of particular inquiry. It is as pernicious a practice, and as dangerous to the landed property of the kingdom, as ever came before the court. It does not appear whether the tenant gave notice to his landlord. That I shall inquire into. The alarming consequence is, that if the practice is tolerated, a tenant in possession, whose duty it is to stand by and defend the possession for the landlord, becomes the instrument to betray him, and through the medium of this court to call upon him to do that which it was the prudence and the justice of the law to prevent; to make a disclosure of his title attacked adversely; and that to be done through the machinations of his own tenant. Suppose he had given notice to his landlord, and that Angove had become defendant, Hernal could not in any manner in this court have made Angove discover his title at law; and the title at law is all the tenant is concerned with. As to the form of the affidavit, I am glad this irregular affidavit has been annexed to the bill; for it has spared the crime of perjury. Stephenton, when this answer without oath comes in, appears to be the real party interested to attack Angove, and have the rent paid into court for a purpose very improper, which I shall state presently. Dungey instead of applying to the landlord, and acting under his attorney, consults with the attorney interested in the dispute. Hernal's case is, that a great while ago he had a *post obit* of Garveth accompanied with a demise of the land, and sold it to Stephenton for half the value on Garveth's

getting into difficulties. The common injunction was obtained. No money was paid in; and Lord Thurlow was strongly of opinion, that the bill ought to be dismissed, considering the payment of the stake into court as a condition upon which the bill must rest, where it appeared to be a case of double vexation. A consent was given by Angove to pass from the dismissal of the bill on paying the money into court. I do not blame him. Perhaps his prudence suggested, that if he was to get rid of the bill, and endeavor to recover the rent by distress, it might be very doubtful. Perhaps it was occasioned by his distress. Then the answer of Angove comes in. The bill is singular; for it suggests a case. An interpleading bill never does that. Hernal by his answer, taken, as it is, without oath, shows this ejectment was a sham ejectment. He states the legal estate to be in Angove, only apprehending that by some other proceeding in this court Angove would after certain incumbrances discharged stand as a trustee for Garveth. He states upon his own answer a flat nonsuit to any ejectment he could have brought; and therefore shows the ejectment was a sham.

Now that the case stands before me the counsel for Hernal have nothing to pray but this; not that I should make any decree, not that I can support any title of Hernal, but simply that the money having been paid into court, I shall retain it, not to dispose of it in this cause, or to give it in this cause to Hernal, but to abide the event of the report of the Master in another cause, the circumstances of which I cannot know. Up to that extent even it shows the purpose of the interpleading bill to have been to obtain the rents to be paid over into court in this cause, instead of applying in that cause for a receiver, the only proper way to take them out of the pocket of Angove into this court. The tenant is not doubly vexed. His own knowledge, or any advice he might have received, could not have suggested any danger from the ejectment. A bill of interpleader will lie, where the tenant may be liable to pay the rent to one of two different persons. In the circumstances of that case both the persons claiming the same rent must claim in privity of tenure and privity of contract; as in the case of mortgagor and mortgagee, trustee and *cestuy que trust*; or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent, and differences arise between them, and she claims the rent. There may be a variety of cases, in which the tenant not disputing the title of the landlord, but affirming that title, the tenure, and the contract, by which the rent is payable, but where it is uncertain to whom it is to be paid, may file a bill of interpleader. In a case before me the other day, where there was a mortgage, the tenant was not bound

to settle the account between the mortgagor and mortgagee. If the mortgagor will not indemnify the tenant, he has a right to come here for an indemnity. But there is no one possible purpose for which I can make a decree with regard to this case. The counsel only press, not for a decree, but for a suspensive order to retain the money to answer some purpose to be obtained in that other cause. The instigator of this bill is doubly vexing. If there is any purchaser under Hernal, that is all in that other cause. Whatever that is by giving the utmost extent to Hernal's right there, it is to be prosecuted in that cause ; and this court by doing what is desired would be suffering one cause to hang up, and the business of it to be done *per indirectum* in another cause. That would be such an aggravation of all the harassing with which suits here are too often attended, that the dismission of this bill only will not do : but to do that which appertains to justice, and that which appertains to example, and to vindicate the honor and justice of the court, I must do more. I will direct the Master to inquire into the circumstances of this case ; and having the circumstances before me it will be fit for me, and I trust I shall have the aid of the bar in it, to consider what is fit to be done. In the meantime I will direct the money to be paid to Angove. I will not yet dismiss the bill ; but will direct an inquiry, at whose instigation it was filed ; and that the Master shall state when and by whom the notice of ejectment was served on the plaintiff ; what proceedings were had upon that ejectment ; and whether notice of the ejectment was given to Angove ; and that the Master shall examine upon interrogatories Dungey the plaintiff, Hernal the defendant, and Stephenton ; and shall report the several examinations, and all facts and circumstances appearing to him material toward the object of the inquiry directed ; and let all farther directions and the consideration of costs be reserved.

On the 5th of August, the report confirming the fraud, the bill was dismissed ; the plaintiff and his solicitor were ordered to pay all the expenses of the defendant Angove as between attorney and client ; and the solicitor was ordered to show cause why he should not be struck off the roll.

COWTAN *v.* WILLIAMS.

IN CHANCERY, BEFORE LORD ELDON, C., AUGUST 8 AND 20, 1803.

[*Reported in 9 Vesey 107.*]

A BILL of interpleader was filed by a lessee of tithes against the lessor, the Vicar, and the assignees under an insolvent act, of which he took the benefit, subsequent to the lease ; both claiming the rent. An action was directed to be brought by the assignees, and to be defended by the Vicar ; which was tried in the Court of Common Pleas ; where it was determined upon argument, that the profits of the vicarage did not belong to the creditors.

The *Attorney-General* for the defendant. The Vicar, upon the question as to the costs, took the objection, that a tenant cannot file a bill of interpleader against his landlord ; according to *Dungey v. Angove*.

Mr. Romilly, for the plaintiff, distinguished this, as a case of exception ; the question arising upon the act of the landlord subsequent to the lease.

The LORD CHANCELLOR concurred in that distinction ; and mentioned Lord Thomond's case ; in which a bill of interpleader was filed by tenants against their landlord and persons claiming annuities, subsequent to the lease ; and the bill was supported by Sir Thomas Sewell : the tenant being by the act of the lessor entangled in a question which he could never settle.

The decree directed, that the costs of the plaintiff, both at law and in equity, and the costs of the defendant, the Vicar, in equity, should be taxed : the plaintiff to be at liberty to retain his costs out of the rent in his hands ; and to pay the remainder to the Vicar ; the defendants, the assignees, to pay to the other defendant, the Vicar, what should be so retained by the plaintiff, and the costs of that defendant, to be taxed.

Mr. Ainge, for the assignees, with reference to the order as to the costs, observed, that this was not the common case : these defendants being trustees for creditors, trying a new question, which it was their duty to bring before the court, as to the other defendant at least.

The LORD CHANCELLOR upon that representation allowed the assignees their costs, as against the other defendant.

... Other plff. were tenant under him.
ever of such-obj. had given assyts to several
tenant 214

(legal - not obj. valid)

notified plff.

ANGELL v. HADDEN.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 29 AND AUGUST 1,
1808.

[Reported in 15 Vesey 244.]

By indentures, dated the 20th of June, 1788, Charles Cole, in consideration of £665, purchased from Nehemiah John Reed, and Ann his wife, an annuity of £95 for the term of ninety-nine years, if Ann Reed should so long live; secured by bond, and an assignment of a rent-charge of £600 per annum, secured to Ann Reed by her marriage settlement, dated the 13th of September, 1786; by which the said rent-charge, to which she was entitled for her life under the settlement, made upon her marriage with her first husband, Benedict Angell, and under his will, subject to a trust term of five hundred years, was assigned to trustees; upon trust, as to one moiety, subject to the appointment of Ann Reed, for her separate use; and as to the other moiety, to pay to Nehemiah John Reed, during the joint lives of him and his wife; and, in the event of her surviving him, upon the trusts declared concerning the first moiety.

Several other annuities were afterward granted by Reed and his wife, to different persons, secured also upon the rent-charge of £600 per annum. After the death of Mr. Reed, his widow married Benjamin Hadden; and gave notices to the plaintiff, tenant for life of the estates, charged with the rent-charge of £600 per annum, not to pay the several annuities that had been granted by her. The bill, therefore, was filed; stating that the several annuitants insist that the plaintiff, Angell, is bound to pay the annuities; that Ann Hadden in her own name and that of M'Farlane, the surviving trustee of the rent-charge, had distrained upon the other plaintiff, Smith, one of the tenants of the premises; charging that the plaintiff, Angell, is ready and desirous to pay the arrears and annuities; but is unable to do so with safety by reason of the inconsistent claims aforesaid; and praying, therefore, that the defendants may interplead, and an injunction against proceeding in the distress.

A motion was made, upon the answers coming in, to dissolve the injunction which had been obtained.

Sir Samuel Romilly, Mr. Bell, Mr. Wingfield, and Mr. Plowden, for the different defendants; Mr. Leach, Mr. Thomson, Serjeant Palmer, and Mr. Owen, for the plaintiff.

THE LORD CHANCELLOR. The case of the Duke of Bolton v. Williams was not, according to one of the reports at least, upon one bill of interpleader, but upon two bills, against several persons, setting

objec... claim, etc.
that there was one bill, of 1 p. e. in trustees
am. But he did not a creation w^t after plff. in
apl. can be made to pay twice - entitled to protection of st.

up claims against the estate. The first objection that has been made in this case is, that this is a bill of interpleader against a great number of persons: but that is no objection. As the terretenant has a

* right to consider the whole charge as one annuity charged upon his estate, the persons entitled to several portions of that charge cannot complain, if he applies to this court; representing that he is desirous to pay this entire charge upon his estate, which they have thought proper to split into parts.

t The next objection is, that here is no suit instituted. That is no

| objection, if the claims are made. Here is no more than one legal right of entry, in the trustees of the term; which M'Farlane has not got in: but I doubt extremely, particularly upon the case of the

| Duke of Bolton *v.* Williams, whether, where a party has a great variety of claims made upon him, he is, before he makes an attempt in this court to render himself safe, to be called upon to discuss how many of these claims can be sustained: the principle of the relief going to protect him, not only from being compelled to pay, but also from the vexation attending the discussion of all the suits that may be instituted.

It was in some degree upon this ground that Lord Thurlow, in the Duke of Bolton *v.* Williams, granted a perpetual injunction against the executors of the annuitants; which did not properly belong to a strict bill of interpleader; for, though he could very well decide upon that, to whom the arrears were to be paid, yet as sums, on account of the future payments, would continually be coming into controversy, unless he had restrained them from proceeding, if they could have maintained any action, which was very doubtful, he could not have given that complete relief which was necessary to deliver the plaintiff from the vexation to which he would have been liable. Lord Rosslyn follows that; holding, that the plaintiff had a right to have all the parties to whom she had made assignments, brought here together; and was not to be put to try with each of them the question upon his claim. The trustee refused to receive the annuity; and several claims were made upon the Duke of Bolton, by persons, several of whom might have sued, using the name of the trustee; and the object of the Duke in coming to this court was, as he might be harassed by all those suits, to have determined for whom Law was a trustee. The reasoning of Lord Rosslyn upon it is in print: that of Lord Thurlow I heard; this being one of the cases decided by his Lordship out of court upon resigning the Great Seal; and the meaning of both was, that, though the Duke, paying the trustee, if he would have received, after notice from persons representing themselves as *cestuy que trusts*, that they meant to insist in equity, that they would intercept that payment, and receive it themselves, giving

notice of the equity, that entitled them to do so, might perhaps have been able to defend himself, yet, if he must discuss that point in two suits, the same principle would justify any number of suits; and the ground of the judgment is, that the Duke held the money for the trustee, if he chose to assert his legal title on behalf of others; but, if he would not assert that title, there was a principle of jurisprudence in this court, entitling the Duke to say he had the money ready to be handed over to any person who had the right to it; and, all these persons making claims, to desire the court to tell him to whom he ought to pay it. The ground, therefore, was, not that he might not have been able by great attention and caution to make himself secure; but that he might secure himself by one suit, instead of perhaps forty; as one payment ought to discharge him.

Even if I thought otherwise of that case than I do, I could not, upon an interlocutory motion, contradict it. The consequence is, that this plaintiff is entitled to come here, in order to know to whom he is to pay this annuity, and the respective portions of it.

The injunction was continued.

SLINGSBY v. BOULTON.

IN CHANCERY, BEFORE LORD ELDON, C., FEBRUARY 24, 1813.

[*Reported in Vesey & Beames 334.*]

IN 1812, the plaintiff, being Sheriff of Yorkshire, received a writ of *fieri facias* upon a judgment obtained by the defendant Boulton against the other defendant, indorsed for £446. The plaintiff levied; but receiving notice, and a copy of a settlement of part of the goods, he made no return; but afterwards paid in £329 2s., being the residue of the levy after deducting the sum paid to the trustees of the settlement; who brought an action of trover against the plaintiff for the goods in settlement; and, the defendant Boulton also claiming, the plaintiff filed a bill of interpleader; offering to bring the money into court, if the court should be of opinion that under the circumstances he ought to do so; and moved for an injunction.

Mr. Barber, for the motion, admitted that this was a bill of interpleader without bringing the money into court; but insisted, that under the circumstances of the case it was not necessary.

Mr. Johnson, for the defendant, resisted the motion, on the ground that the interposition of this court to compel defendants to interplead could not be obtained, when the fund was not deposited.

The LORD CHANCELLOR. Is there any instance of a bill of interpleader by the sheriff? He acts at his peril in selling the goods; and is concluded from stating a case of interpleader; in which the plaintiff always admits a title against himself in all the defendants. A person cannot file a bill of interpleader, who is obliged to put his case upon this, that as to some of the defendants he is a wrong-doer.

No order was made.

WRIGHT v. WARD.

IN CHANCERY, BEFORE LORD LYNDHURST, C., DECEMBER 14, 1827.

[Reported in 4 Russell 215.]

THE bill was filed by William Wright, the executor of the deceased obligor in a bond. It alleged that William Wright, deceased, executed to Joseph Ward a bond for securing the sum of £500, with interest; that Joseph Ward, by his last will, bearing date on the 13th of June, 1811, bequeathed unto Robert Chapman and Richard Bird the sum of £500, upon trust to place out the same upon government or other good security, and to pay the interest thence arising unto his wife Jane during her life, and, after her decease, upon trust to pay and dispose of such £500 in the manner therein mentioned, and he appointed William Ward and Robert Ward to be his executors; that Joseph Ward's will, soon after his death, and upwards of fourteen years ago, was duly proved by his executors; that afterwards William Wright died, having appointed the plaintiff his executor; that all interest on the bond was duly paid up to the time of the death of Joseph Ward; that, after Joseph Ward's death, it was represented and stated to the testator, William Wright, by Joseph Ward's executors, and by Robert Chapman and Richard Bird, that they had arranged and agreed to appropriate the £500, secured by the bond, as and for the aforesaid legacy of £500, or to that effect; that, in consequence of such communication, and with the privity and approbation of Robert Chapman, while he lived, and with the privity and approbation, both before and after his death, of Richard Bird, and of Joseph Ward's executors, the interest, which from time to time after Joseph Ward's death, accrued due upon the bond, was by William Wright, in his lifetime, and, after his death, by the plaintiff, paid to Jane Ward, up to the month of April, 1826; that from that time the interest was due, but the plaintiff was and ever had been ready and willing to pay such interest to Jane Ward, or in any other proper manner, and also to pay the sum of £500 in any proper manner, con-

sistent with the plaintiff's safety; that Robert Chapman had been some time dead; that Robert Ward claimed to be beneficially interested in the legacy of £500 in reversion expectant upon Jane Ward's death; that Robert Ward the younger, and John Ward, a son of William Ward, as well as several children of Robert Ward, claimed reversionary beneficial interests in the £500, and that William Ward and Robert Ward had lately called upon the plaintiff to pay to them the principal sum of £500 secured by the bond; that Richard Bird, on the contrary, alleging the same to have been well and conclusively appropriated to and in satisfaction of the legacy of £500, had given the plaintiff notice not to pay the £500 secured by the bond to the executors or either of them; that the executors had commenced an action upon the bond against the plaintiff; and that the plaintiff did not know to whom he could with safety pay the bond, except under the decree of a court of equity.

The prayer was, that the defendants might interplead, and that the action on the bond might be restrained.

Upon an *ex parte* application, supported by the usual affidavit, the money had been paid into court, and the injunction had issued.

Afterwards, the executors, Robert Ward and William Ward, filed a general demurrer for want of equity; and that demurrer was allowed by the Vice-Chancellor.

The plaintiff appealed.

Mr. Heald and *Mr. Knight* in support of the appeal.

Mr. Sugden and *Mr. Norton* for the demurrer.

In all the cases of interpleader which have been referred to, there was an actual assignment. Here it is not pretended that there has been any assignment; nor is any dealing stated, to which an equivalent operation can be ascribed. The averment is merely, that the executors of the testator and the trustees of the legacy represented to the debtor that they had arranged and agreed to appropriate the bond debt in payment of the legacy. The plaintiff does not venture to assert, that any such appropriation was actually made. In fact, it was impossible that such an appropriation could be made; for the parties to this supposed transaction were not competent to enter into any valid arrangement. The trust, which the will imposed on the trustees, was to lay out the £500 on government or good security; to permit it to remain on mere personal security, was a breach of trust; and even if we were to suppose the tenant for life to have acquiesced in what was done, her acquiescence could not bind the infants who have interests in remainder. That which has been done could not be an appropriation, because there has been nothing done, which would bind all parties. Here the *cestuis que trust*, if the obligee of

the bond were to become insolvent, might file their bill against their own trustees and the executors, and might compel them to replace the money. Even, therefore, if the arrangement stated in the bill were to have any efficacy, it could not give the plaintiff a right to control the executors in their legal remedies for the recovery of the debt. Their duty, in any way of stating the case, is to obtain payment of the money, in order that it may be invested according to the directions of the will, so as to give effect to the supposed appropriation. If any such appropriation has been made, it must be presumed that the executors are proceeding to enforce payment, with a view to make that appropriation complete. The debtor is not to convert himself into a trustee for the person beneficially interested in the legacy. His duty is, to pay to those in whom the testator has reposed confidence; and against them there is not, in the present case, the slightest imputation of insolvency, or any suggestion that they mean to misapply the money. The whole system of the administration of assets will be disturbed, if a debtor may thus come into a court of equity to prevent executors from enforcing payment of a debt due to the estate which they represent, on the suggestion that the executors are trustees for third parties.

It is not enough to say that Bird, the trustee, might file a bill against the executors and the obligor to have the money applied according to the arrangement which is stated. No such bill has been filed, and the debtor may pay with safety to those who have the legal right. Supposing him to pay the money to the executors, could the trustee compel him in a court of equity to pay it over again? Unless the trustee could do so, there is no pretext for representing that the transactions, stated in this record, constitute a case of interpleader.

The LORD CHANCELLOR. The only question is, whether, according to the facts stated in the bill, the surviving trustee of the legacy could file and sustain a bill against the obligor of the bond; and my opinion is, that the facts alleged would be sufficient for that purpose.

A legacy of £500 was left to two trustees, for the benefit of certain persons; and there being a debt of exactly that amount, which the executors had a right to claim from the obligor of a bond, an arrangement was entered into between the trustees and executors, by which it was agreed between them, that this debt should be appropriated to the discharge of the legacy. The trustees and executors then go to the obligor of the bond, and represent to him that they have entered into this agreement; and, after the communication thus made, he, in the first instance, and then his executor, for a series of years, adopt the arrangement; paying the interest, from time to time, not to the executors, but to the *cestui que trust*, with the consent, privity, and

approbation both of the executors and of the trustees. Looking at such a transaction as this, it is impossible to say that there is no ground for the trustees to file and sustain a bill against the obligor; and if they could sustain such a bill, this bill of interpleader must be allowed.

Nothing turns on the circumstance, that there was not any formal assignment or appropriation in writing. If the creditor enters into such an arrangement as is stated here, and acts upon it, the assignment is complete in equity; and as to the question between the trustee and the *cestui que trust*, it has no substantial bearing on the question. The trustee is, at all events, to have this money in discharge of the legacy.

Order of the Vice-Chancellor reversed, and the demurrer overruled.

CRAWSHAY v. THORNTON.

IN CHANCERY, BEFORE LORD COTTONHAM, C., APRIL 23, 25, 27, 1836,
JANUARY 13, 1837.

[*Reported in 2 Mylne & Craig 1.*]

THIS was a bill of interpleader. The plaintiffs were the persons who, for some years previously to the month of August, 1834, constituted, together with William Crawshay, since deceased, the firm of Richard and William Crawshay & Co., but who now constituted the firm of Richard, William, and George Crawshay & Co. The defendants were Henry Sykes Thornton and Pavel Daniloff Daniloff. The bill stated that the plaintiffs had for some years carried on business as iron merchants in London, in partnership, and that they had and have a bonded yard for foreign iron, and have also acted as wharfingers; and that in and prior to the year 1831, the persons constituting the firm of W. & T. Raikes & Co., of London, were in the habit of depositing foreign iron in the plaintiffs' yard for safe custody. The bill then stated, that, in the year 1832, certain specified parcels of iron were deposited with the plaintiffs by W. & T. Raikes & Co., and that, in the early part of the year 1833, an order in writing was brought to the plaintiffs, signed by W. & T. Raikes & Co., requiring the plaintiffs to weigh and deliver the iron; that the order did not specify the name of the person to whom the iron was to be delivered, but that a verbal message was left that the same "was for Mr. Thornton." The bill then stated, that no application having been made for the delivery of the iron, one of the plaintiffs wrote, in pencil, in the book of his firm

which contained an account of the iron, the name "Thornton" against each of the parcels mentioned in the order. The bill further stated, that, in March, 1834, application was made to the plaintiffs by Henry Sykes Thornton, to know the particulars of the iron which the plaintiffs held on his account; and that one of the plaintiffs having theretofore ascertained from Richard Mee Raikes, who then carried on the business of the firm of W. & T. Raikes & Co., that H. S. Thornton was the person in whose favor the order for delivery had been given, wrote in the book of the plaintiffs' firm, which contained the particulars of the iron, against the entry of each of the parcels, the following words and figures, viz.: "8th March, 1834, transferred to H. S. Thornton"; and that the plaintiffs, at the same time, wrote or caused to be written to Thornton a letter in the following words:

"GEORGE YARD, 8th March, 1834.

"SIR: In compliance with your request, we annex a note of the landing weights of the various parcels of CC ND iron, transferred into your name by Messrs. W. & T. Raikes & Co., and now held by us at your disposal.

"We are, etc.,

"RICHARD AND W. CRAWSHAY & CO.

"H. S. THORNTON, Esq."

The bill then stated that R. M. Raikes became bankrupt in October, 1834, but that neither he nor his assignees claimed any interest in the matters in question. The bill then stated, that on the 8th of October, 1834, the plaintiffs received from Messrs. Lemm   & Co., merchants, a letter in the following words:

"Messrs. R. & W. CRAWSHAY & CO.

"I, FINSBURY CIRCUS, 1834.

"GENTLEMEN: You will please to take notice that the whole of the CC ND iron, lying at your wharf, is the property of Messrs. P. Daniloff & A. Lubinoff, of St. Petersburg, and that Messrs. W. & T. Raikes & Co. were agents to them for the sale thereof, and had no power to pledge the same. Learning, however, that Messrs. W. & T. Raikes have pledged certain part of the above iron to Messrs. Williams, Deacon, Labouchere & Co.,¹ and that you have the authority of the latter to hold such iron at their disposal, we beg to inform you that their authority is nugatory, and you are hereby required to treat it as a nullity, and not to part with the possession of any part of such CC ND iron, but hold the whole thereof at the disposal of Messrs. P. Daniloff & A. Lubinoff, for whose house we have the honor to be, etc.

"JOHN LOUIS LEMM   & CO."

¹ H. S. Thornton was a partner in this firm.

The bill then alleged, that Pavel Daniloff Daniloff, being the P. Daniloff mentioned in the letter of Lemm   & Co., carries on business at St. Petersburg under the firm of P. Daniloff & A. Lubinoff, and claims the said iron, and is now resident out of the jurisdiction of the court. The bill went on to state that, in the month of December, 1834, Thornton attended at the plaintiffs' counting-house, and tendered to the plaintiffs their charges in respect of the iron, and demanded the delivery of it ; and that, on the 22d of January, 1835, Lemm  , as the agent on behalf of Daniloff, attended at the plaintiffs' counting-house, and delivered to the plaintiffs the following notice in writing :

"To Messrs. R. & W. CRAWSHAY & Co.

"GENTLEMEN : As the agent for and on the behalf of Pavel Daniloff, of St. Petersburg, in the empire of Russia, trading under the style or firm of P. Daniloff & A. Lubinoff, I hereby demand of you the delivery of the under-mentioned goods, the property of the said Pavel Daniloff Daniloff, *viz.* :" [here followed the particulars of the iron] "and I hereby tender you, as such agent of the said Pavel Daniloff Daniloff, the sum of £200, and such other sum or sums of money as may be due or owing to you in respect of the said goods ; and in the event of your refusing to deliver the same to me as such agent as aforesaid, I hereby give you notice that I shall forthwith cause an action of trover to be commenced against you for the conversion of the said goods, and shall hold you responsible in respect thereof. Dated this 22d day of January, 1835.

"Yours, etc.,

"JOHN LOUIS LEMM  ."

The bill stated that Lemm  , at the time of the demand, tendered and offered to pay any further amount of charges of the plaintiffs in respect of the iron, if the same should exceed £200. The bill further stated that on the 1st of January, 1835, Thornton commenced an action of trover against the plaintiffs, to recover the iron, in which action a declaration was delivered on the 24th of January, 1835 ; and that an action of trover against the plaintiffs for the recovery of the iron was also commenced by Daniloff, on the 23d of January, 1835.

The bill alleged that the warehouse rent, charges, and expenses on the iron due to the plaintiffs, amount to the sum of £160 15s. 6d., and that the plaintiffs claim no interest or right in or to the iron, except in respect of their charges, their right to which is admitted by the defendants ; and that in manner aforesaid the iron is claimed by Thornton and Daniloff. The bill charged that the plaintiffs do not collude with Daniloff and Thornton or either of them, but are ready to dispose of the iron as the court may direct ; that Daniloff alleges

and insists that he claims the iron by a title paramount to the title of Thornton, or the persons under whom Thornton claims the same.

The prayer of the bill was, that Thornton and Daniloff might be decreed to interplead together, and that it might be ascertained to which of them the iron belongs and ought to be delivered over; and that whatever order the court might make respecting the iron, proper directions might be given with respect to the lien which the plaintiffs have upon the same, and as to preserving such lien for the plaintiffs; and that in the meantime Thornton and Daniloff might be restrained from prosecuting their actions at law so commenced as aforesaid, and from commencing any other actions or proceedings at law or in equity against the plaintiffs touching the matters aforesaid.

The bill was accompanied by the usual affidavit negativing fraud or collusion, or any other intent than to avoid being molested by the defendants' proceedings at law.

To this bill the defendant Thornton put in a general demurrer, which was allowed by the Vice-Chancellor on the 11th of May, 1835. The plaintiffs now appealed from his Honor's decision.

Mr. Maule and *Mr. Richards* for the bill.

The simple question is, whether Crawshay & Co. have by their conduct put themselves in such a condition, as to deprive them of their right to compel the defendants to interplead. The iron is worth £7,000. It still remains *in specie*; and if the plaintiffs, after notice from Daniloff of his claim, were to part with it to any other person, they would be answerable to him for its value. The ground of the demurrer is, that the plaintiffs have made themselves personally liable to Thornton by their letter of the 8th of March; and the question will be, whether that letter amounts to a contract. Thornton, if the mere assignee of Raikes & Co., must stand or fall by the rights of Raikes & Co. If a wharfinger receive goods from a person who is not entitled to them, the wharfinger may refuse to deliver them up to him, and may set up a property in another individual to justify that refusal.¹ The facts of the latter case correspond with the facts of the present case. The argument in support of the demurrer before the Vice-Chancellor in the present case was, that a wharfinger or bailee cannot repudiate the title of the person by whom goods have been delivered to him, if he receives the goods, and gives an acknowledgment that he holds them for the person by whom they were delivered to him. There have been cases, however, of stolen notes, in which the persons who had stolen them could not recover them from others to whom they had themselves delivered them, because it appeared that they had been fraudulently

¹ Ogle v. Atkinson, 5 Taunt. 759; Cotter v. The Bank of England, 3 Moore & Scott 180.

procured. It may be admitted, that if a person deposits goods with a bailee, and afterward sells them, and the bailee acknowledges the title of the purchaser, he cannot subsequently repudiate that which he knows to have taken place between the vendor and the purchaser; and it may also be conceded, that if a person, knowing of disputes with respect to the title to property, chooses to take upon himself to decide in favor of the title of one of the disputing parties, he cannot afterward repudiate that title; but if he does not know of such disputes, and gives an acknowledgment to a person who afterward turns out to have no title, the acknowledgment may be repudiated; this appears from Mr. Justice Alderson's observations in *Gosling v. Birnie*.¹ So, an acknowledgment made in mistake may be repudiated by the person who has made it.² The cases relied upon on the other side before the Vice-Chancellor were cases of stoppage *in transitu*; they were *Harman v. Anderson*,³ *Stonard v. Dunkin*,⁴ *Hawes v. Watson*.⁵ The latter case was clearly one in which the defendants had put it in the power of a third party to incur a liability, which he did incur; and if, in the present case, the situation of Thornton had been altered by the acknowledgment, it might make a difference.⁶ It is to be observed, that the terms of the letter of the 8th of March acknowledge that the iron had been transferred into the name of Thornton by Raikes & Co. and not by the plaintiffs. The plaintiffs did not intend to give Thornton a better title than Raikes & Co. had before. The plaintiffs had not admitted the title of Raikes & Co. It is the universal practice of the London Dock Company, and of all wharfingers, upon any deposit of goods, to give an acknowledgment that the goods are held for the benefit of the depositors. The bill only states that the plaintiffs being wharfingers, Raikes & Co. deposited the iron with them. The letter of the 8th of March is not a contract by the plaintiffs with Thornton, to hold the iron for him; if it were, Thornton would bring a very different action from that which he has commenced; he would not bring an action for the recovery of the specific goods. The case of *Nickolson v. Knowles*⁷ will be cited on the other side; but the present Vice-Chancellor, in *Smith v. Hammond*,⁸ intimated an opinion that that case was carried too far. *Roberts v. Ogilby*⁹ is a very different case from this, because there the parties were not going against the goods themselves.

In equity, the rule is clear, that unless the plaintiffs have been

¹ See 7 Bing. 346.

² *Heane v. Rogers*. See 9 B. & C. 586, observations of Bayley, J.

³ 2 Camp. 243.

⁴ Ibid. 344.

⁵ 2 B. & C. 541.

⁶ *The Stratford and Moreton Railway Company v. Stratton*, 2 B. & Adol. 518.

⁷ 5 Mad. 47.

⁸ 6 Sim. 10.

⁹ Price 269.

guilty of misconduct or collusion, the court will assist them. It is to be remembered that the question is not between Raikes and Thornton, but between Daniloff and Thornton. The cases of *Langston v. Boylston*¹ and *Stevenson v. Anderson*² show how far courts of equity have gone in allowing interpleader. *Langston v. Boylston* much resembles this case. Whether or not a bailee gives an acknowledgment is immaterial; he still holds as agent for the depositor. A doubt expressed by Sir John Leach in *Lowe v. Richardson*,³ as to whether the captain of a vessel can file a bill of interpleader, if the adverse claims are paramount to the bill of lading, was much relied on, in support of this demurrer in the court below; but it appears by a note in the index to the volume of reports containing that case,⁴ that in *Morley v. Thompson*, 29th of July, 1819, Sir John Leach retracted the opinion which he had expressed in *Lowe v. Richardson*. In *Pearson v. Cardon*,⁵ the ground upon which the Vice-Chancellor allowed the interpleader was, that there was a claim of paramount title, although the holders of the goods in that case had admitted themselves to be agents. Where is the difference between such an admission as that, and the admission contained in the letter of the 8th of March? The decision in *Pearson v. Cardon* has since been affirmed on appeal.⁶

In *Cooper v. De Tastet*⁷ the Master of the Rolls seems to have thought that there was a distinction between depositing goods in a bonded warehouse, and in a private warehouse, and that interpleader might be allowed in the case of a deposit in the former, when it would not be allowed in the case of a deposit in the latter. If there is anything in that distinction, the plaintiffs will have the benefit of it, for the bill states that the yard in which the iron was deposited was a bonded yard.

The consequences of supporting the Vice-Chancellor's judgment in the present case will be most serious, because such an acknowledgment as the present is of every day's occurrence. The person claiming goods has never any better title than the person under whom he claims, except in case of sale in market overt. In all the cases of stoppage *in transitu*, which were cited on the other side in the court below, the party to whom the acknowledgment was given was the party who had the title. Those cases, however, have nothing to do with the present case. The judgment in *Gosling v. Birnie*⁸ went entirely on the ground of the acknowledgment having been made with full knowledge of the circumstances. It would seem that the affected

¹ 2 Ves. jun. 101.

² 2 V. & B. 407.

³ 3 Mad. 277.

⁴ See 3 Mad. 564.

⁵ 4 Sim. 218.

⁶ 2 Russ. & Mylne 606.

⁷ 1 Tamlyn 177.

⁸ 7 Bing. 339.

object for which the letter of the 8th of March was applied for, was to ascertain the exact weights and marks of the iron ; the acknowledgment is only this, viz.: that so far as Raikes had a title, that title is transferred to Thornton. If *Cooper v. De Tastet* be an authority against the right of interpleader in this case, it is distinctly overruled by *Pearson v. Cardon and Mason v. Hamilton*,¹ the latter of which decisions is precisely in point. Suppose goods are stolen and pawned, the acknowledgment given by the pawnbroker to the person who pawns them, does not divest the property of the owner, and the owner is entitled to insist on having them delivered up to him ; the pawnbroker is not estopped, by the acknowledgment, from saying to the person who has pledged them, that they are claimed by a title paramount.

There is nothing in the Interpleader Act which deprives this court of the power to direct interpleader in this case. The Vice-Chancellor entered into no detail of the reasons for his judgment, but stated that he had conferred with Mr. Justice Bosanquet, to whom an application had been made beforehand for a rule calling upon the defendants to interplead at law, but who had refused the application. In Viner's Abridgment, title Enterpleader (N. 9), it is said, "in detinue, if they count of several bailments, the defendant may say it came to his hands as executor, *absque hoc*, that he had it of their delivery, and then the plaintiffs shall interplead."

Mr. Jacob, Mr. Wigram, Mr. Girdlestone, sen., and Mr. G. S. Wilson in support of the demurrer.

A holder of goods is not entitled to file a bill of interpleader in every case in which double claims for those goods are made upon him. He must be not only a stakeholder, but an indifferent and an innocent stakeholder ; he must show that it has not been by any wrongful or erroneous act of his own, that the embarrassment of the double claims has been produced ; he cannot file a bill of interpleader against a person with respect to whom he has put himself in such a position as to preclude him from disputing that person's title. It is the rule, both at law and in equity, that a tenant cannot dispute the title of his landlord ; and so likewise an agent or servant, who holds personal property belonging to his principal or his master, cannot dispute his principal's or his master's title. If this were not the rule, a person could have no security in the enjoyment of his property, unless he kept it always in his own actual possession. A contrary principle would lead to frightful consequences in mercantile transactions. It is true that, if after the commencement of the relation of tenant or agent, the landlord or

¹ 5 Sim. 19.

principal has done any act which has occasioned embarrassment, and has raised questions subsequently to the commencement of the tenancy or agency, a right of interpleader would arise; and a tenant may show that a landlord's title has determined since the commencement of the tenancy. The acts of the plaintiffs in this case have materially increased the difficulty under which they labor. The act of transfer and the letter of the 8th of March have conferred a title, or color of title, upon Thornton. No case has been cited for the plaintiffs in which even the transfer alone was not held to give a title; much less one in which such a letter was not held to give a title. In *Stonard v. Dunkin*¹ it was objected that the property in certain malt had not passed to the plaintiff for want of remeasuring; but Lord Ellenborough said that the defendant was not entitled to raise that objection, after he had in writing acknowledged the plaintiff's title. It is upon the faith of the acknowledgment contained in the letter of the 8th of March, that Thornton has ever since that day employed and hired the plaintiffs as his warehousemen, and that he has thenceforward become liable to them for the wharfage; they have held the goods ever since as his agents. If it could be shown that the acknowledgment had been given under fraud or deception of any kind, the case might be altered; but no such charge is made by the bill. The plaintiffs have made no case to relieve themselves from the effect of the acknowledgment and estoppel. It does not appear upon the bill that the goods are not the property of Raikes. The bill merely states, that an action for the recovery of the goods had been brought by Daniloff. In the report of the case of *Cotter v. The Bank of England*² it does not appear whether the conflicting claim was paramount to Cotter's, or whether it arose from acts done by him. No point like the present arose. That case was held to be within the Interpleader Act, because the lien of the holders was upon the goods themselves, and not as against one party or the other, and therefore the holders were perfectly neutral.

*Langston v. Boylston*³ was a case in which the title or color of title of the adverse party had arisen subsequently to the commencement of the relation of principal and agent between the original parties. So in *Stevenson v. Anderson*,⁴ the arrestment originated subsequently to the deposit. *Lowe v. Richardson*⁵ and *Nickolson v. Knowles*⁶ go the whole length of the doctrine, that an agent cannot compel his principal to interplead. *Nickolson v. Knowles* is of later date than the case of *Morley v. Thompson* before cited, which is very imperfectly men-

¹ 2 Camp. 344.

² 3 Mo. & Scott 180.

³ 2 Ves. jun. 101.

⁴ 2 V. & B. 407.

⁵ 3 Mad. 277.

⁶ 5 Mad. 47.

tioned in the index to 3 Mad. The cases of *Cooper v. De Tastet*¹ and *Pearson v. Cardon*² both arose out of similar disputes between De Tastet and his partners, Bize, Bordenave & Co. It appears by the Lord Chancellor's judgment upon appeal in the latter case (not yet reported),³ that he coincided with the doctrine of Sir John Leach in *Cooper v. De Tastet*; and he admitted that an agent could not, as agent, file a bill of interpleader against his principal, unless under special circumstances; but his Lordship thought that the relation of principal and agent had not been constituted in that case. *Cooper v. De Tastet* and *Pearson v. Cardon* were cases of disputes between partners; and if two partners jointly deliver goods to an agent, and afterward quarrel, and claim the goods separately, it may be very proper that the agent should be able to compel them to interplead. The case cited from Viner was one in which goods were delivered to the agent by several persons, not by one person, as in this instance. The bill contains no suggestion that Thornton is otherwise than a perfectly honest and innocent party, without knowledge of Daniloff's claim.

The characteristics of a real case of interpleader are, that the holder of the goods being under a single liability only, is yet subject to be vexed by more than one claim. The establishment of the title of one claimant, however, is a discharge of the title of all the others. There is no case of interpleader where the holder has made himself personally liable to several persons. All the cases cited establish that definition of interpleader. It is quite possible that the title to goods may be in one person, and, at the same time, a right of action for them may be in another person. The Vice-Chancellor said, in giving judgment in this case, that the title to the goods would not necessarily come into question in the action between Thornton and the plaintiffs. A court of equity would not restrain him from proceeding at law upon the plaintiffs' agreement.

[The LORD CHANCELLOR. If what has taken place amounts to an independent contract, it is one which cannot be decided between the parties in this suit. Then comes the question, whether what has taken place does amount to an independent contract. The plaintiffs say it is, in fact, a mere question of title.]

Whether there is an independent contract or not, is a question which must be tried at law; the only question which can arise at law will be, whether the letter and the dealing stated in the bill were founded on good consideration between Thornton and the plaintiffs. Any actual alteration, by subsequent dealing on the part of Thornton, cannot, at law, make any difference; but it is admitted, on the other

¹ 1 Taml. 177.

² 4 Sim. 218.

³ Now reported, 2 Russ. & Mylne 606.

side, that alterations by subsequent dealing on Thornton's part, might affect the right of the plaintiffs to compel interpleader. If the right be not clear, there is a question at law upon what passed between the plaintiffs and Thornton ; the question is not only between Daniloff and Thornton, but between the plaintiffs and Thornton. The only case opposed to the positions assumed by Thornton is *Pearson v. Cardon* ; but Lord Brougham, in giving judgment in that case, said, that there could be nothing more alarming, than that a wharfinger should be allowed to say, that he does not hold goods for the person who has deposited them with him. The ground of the ultimate decision of that case was the partnership between the parties.

The case of *Adamson v. Jarvis*¹ shows, that if the conduct of Raikes & Co. has led the plaintiffs into difficulty, the plaintiffs have their remedy against them. It is an essential qualification, both at law and in equity, of the right to compel interpleader, that the person seeking to enforce that right should be in a condition of complete neutrality ; that he should have no interest in the question, and that he should be quite indifferent which party succeeds.² It is not indifferent to the plaintiffs which of the defendants shall succeed. Thornton raises a personal claim against the plaintiffs. If Thornton recovers the iron from the plaintiffs, they will have also to answer for its value to Daniloff. The plaintiffs have a lien for wharfage as against Thornton, but not as against Daniloff ; they are not, therefore, perfectly neutral.³ In that case Lord Chief-Judge Tindal seems to have considered that a wharfinger, claiming a lien on the goods, as in the present case, could not maintain a bill of interpleader : so, the holder of goods cannot compel persons claiming them to interplead, if the difficulty in which the holder is placed by the conflicting claims has been occasioned wholly or in part by his own acts.⁴ The letter of the 8th of March and the transfer gave Thornton a clear right to obtain from the plaintiffs either the iron, or damages to the extent of its value. On what principle is this court to say that the benefit of that letter and that transfer is to be taken from Thornton ? The object of this bill is to obtain a declaration that the case is to be dealt with as if the letter and the transfer had never existed ; to put Thornton in just the same condition as if the plaintiffs had filed a bill, and obtained a decree for setting aside the letter and transfer on the ground of fraud.

Mr. Maule in reply.

It is quite clear that the decision in *Cooper v. De Tastet* was founded upon an assumption that a person with whom goods had been

¹ 4 Bing. 66.

² *Mitchell v. Hayne*, 2 Sim. & Stu. 63.

³ *Braddick v. Smith*, 2 Mo. & Scott 151 ; s. c. 9 Bing. 84.

⁴ *Slingsby v. Boulton*, 1 V. & B. 334 ; *Belcher v. Smith*, 9 Bing. 82.

deposited by another who was not the owner, could after a demand made by the true owner, defend himself from the true owner's claim, by redelivering the goods to the person from whom he had received them. That assumption is erroneous, and the decision is clearly overruled by *Pearson v. Cardon* and *Mason v. Hamilton*. It will not always follow, as Lord Brougham appears to have supposed in his judgment in *Pearson v. Cardon*, that there can be no case in which an agent can file a bill of interpleader against his principal : for instance, if an agent were directed by his principal to cut down a tree, and a third person were to claim the tree, as being the owner of the land upon which it stood, the agent would be entitled to file a bill of interpleader in such a case. It is said that the letter of the 8th of March amounts to an attornment; but an attornment does not make a title.¹ That letter, having been written in ignorance of the fact that Raikes & Co. had no authority to pledge the goods, did not amount to an attornment. Thornton and Daniloff, in their respective actions, claim identically the same thing, in identically the same form ; and when that is the case, interpleader will lie. If it were the rule that interpleader should lie only where the conflicting claims were to be tried upon the same evidence, there would be an end to the jurisdiction of interpleader altogether. The evidence is always in some respects different. If the iron, having been deposited with the plaintiffs by Raikes & Co., had been, by the order of Raikes & Co., actually delivered by the plaintiffs to Thornton, and Thornton had redelivered it to the plaintiffs, and the plaintiffs had given him an acknowledgment that they held it for him, and then the claim of Daniloff had been made, Thornton might have brought an action against the plaintiffs upon the contract made by the acknowledgment ; but it cannot be said that in such a case interpleader would not lie. The circumstances of the present transaction, however, cannot be distinguished from such a case. The letter and transfer do not amount to more, if so much as, a delivery to Thornton, and a redelivery to the plaintiffs to hold on his behalf. The letter and the transfer do not create a more binding contract than would have been implied between the parties, if the letter had never been written, and the transfer had never been made. It is said that Raikes & Co. would be bound to indemnify the plaintiffs against the consequences of delivering the iron to Thornton ; but the plaintiffs are not bound to rely on such an indemnity ; and besides, the law will not imply or enforce an indemnity, for doing a thing which is unlawful : and upon this principle, an indemnity given to the editor of a newspaper for inserting a libel cannot be enforced. There is no ground

¹ *Rogers v. Pitcher*, 6 *Taunt.* 202.

for depriving the plaintiffs of the right which they would have if the letter had not been written ; that letter being a statement of a fact which might have been proved in some other way. If there had been an actual contract, and an action upon the contract had been brought, instead of an action of trover, the result could only have been the same in effect ; namely, damages. It has been long settled that it can make no difference whether the action is in the form of tort, or of contract ; but here, there is not even that difference, because the letter is a mere statement of a matter of fact.

The LORD CHANCELLOR. This was an appeal from an order of the Vice-Chancellor, allowing a demurrer of the defendant, Henry Sykes Thornton, to the bill, which is a bill of interpleader against this defendant so demurring, and one Pavel Daniloff.

The question, therefore, turns entirely upon this, whether the statement in the bill constitutes such a case against the defendant Thornton as entitles the plaintiffs to the ordinary protection afforded by a bill of interpleader. [His Lordship then stated the allegations and the prayer of the bill.]

The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest ; because, if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs ; and the injunction, which is of course if the case be a proper subject for interpleader, would deprive a defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant ; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation. Such a case, undoubtedly, would not be a case for interpleader. A party may be induced by the misrepresentation of the apparent owner of property, to enter into personal obligations with respect to it, from which he may be entitled to be released by a court of equity ; but such a case could not be a subject for interpleader between the real and pretended owners. In such a case, the plaintiff would be asserting an equity for relief from a personal contract against one of the defendants, with which the other would have nothing to do.

It is familiarly said that there is no interpleader between landlord and tenant, or principal and agent ; but it will be found that the reason

for this lies deeper than might be inferred from the statement of this rule; and that it is to be considered not so much as an independent rule, as a necessary consequence of the principle of all interpleading. In both these cases, rights and liabilities exist between the parties, independent of the title to the property, or to the debt or duty in question, and which may not depend upon the decision of the question of title. It is true that in this case both the actions are actions of trover; but it was most properly admitted by the counsel for the plaintiffs, that the dealings of the plaintiffs with Mr. Thornton would be evidence for him in his action. Suppose then, that those acts, the transferring the iron into his name in the plaintiffs' books, and the letter of the 8th of March, 1834, should be held sufficient to procure for Mr. Thornton a judgment in his action, without inquiring whether Messrs. Raikes had or had not a legal right to exercise dominion over the property as they did, by ordering the transfer of it to Mr. Thornton, how could such a right be the subject of interpleader between Mr. Thornton and Mr. Daniloff? In such a case there would be no question in common, and therefore nothing to be tried between them; Mr. Daniloff might obtain a verdict upon showing his title to the iron; and Mr. Thornton, upon showing that Messrs. Crawshay had come under a personal liability by their dealings with him, independently of the question of title. This court cannot take from Mr. Thornton a right he may have obtained against Messrs. Crawshay, without substituting some mode of litigation by which he may enforce all his rights. In the case supposed, this could not be done in any litigation with Mr. Daniloff.

On the part of the plaintiffs, it was contended that this case must be regulated by the rule in cases of bailment. It will be to be considered what that rule is; but that rule, if in favor of the interpleading, would not be decisive, because in the case of simple bailment, there is no personal undertaking, and no liability or right of action beyond that which arises from the legal consequences of the bailment.

Hawes *v.* Watson¹ and other cases show that Mr. Thornton may, from the acts of the plaintiffs themselves, have a right against the plaintiffs, independently of the question whether Daniloff be or be not entitled to the iron. This is a right which cannot be the subject of litigation between the defendants, and what ground can there be for depriving Mr. Thornton of that right by injunction?

Up to a late period there does not appear to be any authority which could raise a doubt as to the rule of this court, with respect to interpleading in cases of bailment.

The interpleader at law was where there was a joint bailment by both claimants.

¹ 2 B. & C. 540.

In equity, it is defined to be where two or more persons claim the same debt or duty.

It is no exception to the rule that a tenant or an agent cannot file a bill of interpleader against his landlord or his principal, that where the landlord or the principal has created a subsequent interest in some other person, the tenant or agent may maintain such a bill; because, in such case, the same debt or duty is claimed, and it is the act of the person entitled to such debt or duty which creates the equity of the party owning it.

In *Nickolson v. Knowles*¹ Sir John Leach acted upon this principle, and refused an injunction in an interpleading suit by a broker, against those by whom he was employed, and another who claimed the property by a paramount title.

In *Cooper v. De Tastet*² Sir John Leach acted upon the same rule, and refused to a warehouseman, seeking to compel his principal to interplead with another person who had claimed the property, the benefit of an injunction. In that case, expressions are, by the report, attributed to the learned Judge, which it may be difficult to explain. It appears, however, that the judgment was not given from any written note, and he may perhaps have been misunderstood. And if the expressions were used, they can only be considered as *dicta*; the facts of the case not requiring any decision upon the point. The learned Judge is supposed to have said that the case would be different, if the plaintiff had been owner of a bonded warehouse; but no reason is given for the distinction; and the circumstance of the warehouse being one appointed under the act to receive goods on bond, does not alter the relative situation of the owner and of the warehouseman.

Two decisions, however, are supposed to have thrown doubt upon this established principle in cases of interpleader.³ The first, as reported, would certainly seem to create some difficulty; the report attributing to the Vice-Chancellor the expression, that admitting that the plaintiffs were agents for one party, yet that there was a claim made by another under a paramount title, and that his Honor was therefore of opinion that it was a case of interpleader. In this there must be some mistake; interpleader, as between agent and principal, being admissible only where the adverse claim is under a derivative, and not under a paramount title; and although the case on appeal before Lord Brougham is not reported,⁴ I have been furnished with a note of Lord Brougham's judgment, and have the satisfaction to find

¹ 5 Madd. 47.

² 1 Tamlyn 177.

³ *Pearson v. Cardon*, 4 Sim. 218; 2 Russ. & Mylne 606; *Mason v. Hamilton*, 5 Sim. 19.

⁴ The case is now reported, 2 Russ. & Mylne 606.

that his Lordship, in affirming the Vice-Chancellor's order, recognizes the established rule, and anxiously guards himself against being supposed to intend any infringement upon it ; and he decided that case entirely upon its own peculiar circumstances, and upon the ground that the adverse claim was derivative and not paramount.

In *Mason v. Hamilton*, the principal question was that of costs, the party who had given the notice having withdrawn his claim, though not till after the bill was filed ; and as that was the party ordered to pay the costs, it is probable that the attention of the court was not much directed to the point for which it is now cited ; and even if that were otherwise, the case would be but a slight authority for the present, inasmuch as although the bailor had directed the bailee, the plaintiff, to transfer the goods into the name of the party whose claim was afterward acquiesced in, there was not, as in this case, any dealing between the bailee and such party, recognizing his right, and contracting with him upon the footing of it. Besides which, if the Vice-Chancellor did express any such opinion as is there attributed to him, I have the satisfaction of knowing, from the Vice-Chancellor's judgment in this case, that at a subsequent period, when the point was brought distinctly before him, he entertained an opinion in conformity with that which I have expressed upon this subject.

I have thought it right to enter thus fully into the case, not from any doubt I at the time entertained about it, but to remove an impression which seems to have been entertained, that those cases were to be considered as affecting the other cases in questions of interpleader.

The appeal must be dismissed, with costs.

Sir William Horne and *Mr. Sidebottom* appeared for the defendant Daniloff ; but as he had not demurred, and consequently was not a party to the appeal, they were not allowed to be heard. They applied, however, for the costs of their appearance under the following circumstances :

The order for setting down the appeal was served on Daniloff's solicitor, who afterward received a letter from the plaintiffs' solicitors, informing him that an application was about to be made to have the appeal advanced, and requesting to know whether he would consent to its being advanced.

The LORD CHANCELLOR was of opinion that Daniloff was not entitled to the costs of his appearance upon the hearing of the appeal ; and said, that although it was now the settled practice of the court, that when a petition was served upon unnecessary parties who appeared, they were entitled to their costs, that case did not resemble the present. The answer to a petition required the attendance of all parties concerned, and it became an order of the court upon every party

whom the petitioner chose to serve with it. The letter sent to Daniloff's solicitor, in the present instance, was merely an unnecessary application to him for his consent to the appeal being advanced; it did not invite him to attend the hearing of the appeal.

SHAW v. COSTER AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, MAY 5, 1840.

[Reported in 8 Paige 339.]

THIS case came before the Chancellor upon the appeal of the complainant from a decree of the Vice-Chancellor of the First Circuit, dismissing the bill as to all the defendants; and upon the cross-appeal of the defendants, Coster and Dey, from so much of the Vice-Chancellor's decision as refused them their costs against the complainant. The complainant, as the Sheriff of New York, in February, 1829, by virtue of an execution in favor of the defendants, T. L. & W. W. Chester, against Bailey and Haskell, levied upon the furniture and property in Washington Hall, as the property of Bailey, one of the defendants in the execution. The property, however, had been mortgaged to the defendant Coster, the owner of Washington Hall, who had leased the house to Bailey. And Coster claimed the property under his mortgage, the greater part of the moneys secured by which was then due, and he forbid the sheriff's meddling with the property. An arrangement was subsequently made between Bailey and Coster, and Waterman and Bosquet, by which the lease was surrendered by Bailey and his interest in the property assigned to Waterman and Bosquet; who paid a part of the debt due to Coster and took a new lease from him, and at the same time gave to him another mortgage upon the property, to secure the balance of the debt due from Bailey, and also to secure the payment of the rent which should become due under the new lease. This new arrangement was made subsequent to the return day of the execution of the Chesters. Waterman and Bosquet afterward sold their interest in the lease and in the property to Jump and Artiguenare, who went into possession. In February, 1830, Coster distrained upon the property for the rent due under the new lease, and also advertised the property for sale under his mortgage. Jump thereupon filed a bill in chancery against Coster and Artiguenare claiming the property, and the defendant Dey was by the consent of the parties appointed the receiver of the property in that suit. Both Coster and the Chesters

- (1) no aff. as to collection
(2) money not brought in
(3) no brief

claimed a preference in payment out of the property; but as it was supposed the property would sell for enough to pay both debts, it was agreed between the sheriff and Dey, the receiver, that the property should be sold by an auctioneer, and that the rights of the several claimants should be determined afterward. This arrangement was assented to by the several parties to the suit in which Dey was receiver. But the Chesters, although they were willing to co-operate in the sale, insisted upon the sheriff's retaining the whole control of the proceeds of the sale to the extent of their execution. And previous to the sale Dey, the receiver, gave a formal notice to the sheriff that the property was in his hands as such receiver, and that he claimed the entire control over it, and forbid the sheriff from interfering with it. After the sale it was found that the proceeds were not sufficient to satisfy the mortgage and the execution; and Dey, the receiver, forbid the auctioneer from paying any part of the proceeds to the sheriff to apply on the execution, and the Chesters forbade his paying it to Dey until the execution was satisfied. The solvency of the auctioneer being doubted, the sheriff and receiver agreed to withdraw the money from his hands. And \$880, the amount in controversy between them, was thereupon deposited by them in bank, in their joint names, to abide the further decision which might be made upon the claims of the respective parties to the money. The Chesters subsequently ruled the sheriff to return the execution; and under the direction of the court he made a special return stating the several claims, the sale of the property, and that the money remained in his hands subject to those claims. The Chesters subsequently offered to indemnify the sheriff against any claim upon him for the money, if he would pay it over to them; and sent him a bond of indemnity, but he neglected to make any answer to the application. He afterward filed his bill of interpleader in this cause, setting forth the facts; but without annexing thereto the usual affidavit denying collusion with either of the parties. Neither did the bill contain any offer to bring the money into court. But the complainant stated that he could not bring it into court in consequence of the arrangement made with Dey, the receiver, by which the money was deposited in bank in their joint names. Jump suffered the bill to be taken as confessed, for want of an answer. The defendants Coster, Dey, and Chesters put in their several answers; all contesting the right of the complainant to file a bill of interpleader, and setting up their respective claims to the fund in dispute. The cause was heard as to them upon pleadings and proofs. The Vice-Chancellor decided that it was not a proper case for an interpleading suit; and he therefore dismissed the bill with costs as to the Chesters, who had offered to indemnify the sheriff upon

his paying the amount of their execution; but without costs as to the other defendants.

George Curtis for the appellant.

C. Bushnell for the Chesters.

B. W. Bonney for Coster and Dey.

The CHANCELLOR. The Vice-Chancellor was clearly right in supposing this was not a proper case for a bill of interpleader; even if the complainant's allegations had left it doubtful whether he was entitled to the property in question under the execution in favor of the Chesters, or whether it belonged to the defendant Dey in his character of receiver in the suit of Jump against Coster and Artiguenare. Judge Story, in his very valuable treatises on Equity Jurisprudence and on Equity Pleading, has so fully and so correctly stated the law on the subject of interpleader, that it is only necessary to refer to those works, in a judicial opinion. In the first place, the complainant in a bill of interpleader must annex an affidavit to his bill that there is no collusion between him and any of the other parties. And if the bill is filed in relation to moneys in his hands, he must either bring the money into court, or at least must offer to do so by his bill; so that the court may by its order compel a compliance with that offer, upon the application of either of the defendants.¹ The complainant must also show that he is in the situation of a mere stakeholder, having no personal interest in the controversy between the defendants, and that their respective claims against him are of the same nature or character.²

In the case under consideration, there was no privity between the complainant and the defendant Coster, in relation to the property in Washington Hall. And if the deputy sheriff ever in fact levied upon that property by virtue of the execution in favor of the Chesters, the complainant claimed title to the property, as sheriff, adverse to the title of the defendant Coster under his mortgage. Frequent attempts have been made by sheriffs to sustain bills of interpleader where the property levied on by them has been claimed by third persons, adverse to the claim of the sheriff and the creditor under the execution. But I have not been able to find any case, in which the question has been deliberately examined, where a court of equity has decided in favor of such a proceeding. Indeed it would be contrary to every principle of justice to permit a sheriff to seize property, claimed by a third person, under an execution against a judgment debtor, and then to compel such third person to come into a court of equity and liquidate the question of right to such property with the creditor in the

¹ 2 Story's Eq. 116, § 809; Story's Eq. Pl. 237, § 291.

² 2 Story's Eq. 118, § 812; Story's Eq. Pl. 239, §§ 294, 297.

execution, instead of trying the question at law, against the sheriff himself as the wrongdoer. In *Slingsby v. Boulton*,¹ where the goods seized and sold by the sheriff were claimed by trustees under a settlement, who brought an action of trover therefor against him, Lord Eldon refused an injunction, upon a bill of interpleader filed against the trustees and the creditor in the execution. He said the sheriff acted at his peril in selling the goods, and was concluded from stating a case of interpleader, in which the complainant always admitted a title in all of the defendants against himself. That a person could not file a bill of interpleader who was obliged to put his case upon this; that as to some of the defendants he was a wrongdoer. From the marginal note of the reporter to the case of *Stoors v. Payne and others*,² it would appear that the Chancellor had decided that a bill of interpleader might be filed by a sheriff to settle the question between the claimant of the property and the creditor in the execution. But upon looking at the case itself, the decision appears to be the other way. It is true the Chancellor says the plaintiff may file his bill if he pleases; but he does not intimate an opinion that he can succeed in such suit. As I understand the case, it was an *ex parte* application for an injunction, upon a bill of interpleader; which application was denied on the ground that the Virginia statute had made ample provision for the protection of the sheriff without the necessity of resorting to a court of equity for relief. And the permission to file the bill was nothing more than saying, "If you wish to have this question as to your right to proceed by a bill of interpleader more deliberately settled, and in a manner in which you can have the benefit of a review by the Court of Appeals, you can file your bill and proceed in your suit; though I will not grant the injunction in the meantime."

The case of *Nash v. Smith*, referred to in the opinion of the Vice-Chancellor, from the Connecticut reports, is not an authority in favor of the sheriff's filing a bill of interpleader in a case like the present. In that case neither of the defendants in the bill of interpleader claimed title to the property adversely to Silliman, against whom the process in the hands of the constable was issued. The constable therefore had no interest adverse to the claim of either party, as each had put into his hands process against the same property: the one claiming it as the individual property of Silliman, and the other as the partnership property of Silliman and Cook. There was therefore a privity between the constable and each of the defendants. And the only question was whether the proceeds of the

¹ 1 Ves. & B. Rep. 334.

² 4 Hen. & Munf. Rep. 506.

sale which had been rightfully made, should be applied to the payment of the individual debt of Silliman, which belonged to the defendant Mitchell, or of the partnership debt of Silliman and Cook, which belonged to the other defendants. That was clearly a proper case for a bill of interpleader; if the complainant, instead of paying the money over to one of the parties in satisfaction of the execution against Silliman individually, had retained the proceeds of the property which he had rightfully sold, and had offered to bring it into court to abide the decision upon the bill of interpleader.

In the case before me, whatever may be the rights of the several defendants upon the case as stated by the bill, I am inclined to think the bill itself was defective in attempting to state the whole facts on which the legal rights of each depended; instead of stating that the defendant Coster and the receiver claimed them under an alleged mortgage which had become due previous to the issuing of the execution, and which mortgage had been given up after the return day of such execution, and another one given in its place by the assignees of Bailey. This is what Lord Rosslyn probably meant as "suggesting a case," in *Dungey v. Angove*;¹ which he says an interpleading bill never does. As I understand the law, the complainant in a bill of interpleader must show that he is ignorant of the rights of the respective parties who are called upon by him to interplead. Or that at least there is some doubt, in point of fact, to which claimant the debt or duty belongs; so that he cannot safely pay or render it to one, without risk of being made liable for the same debt or duty to the other. And therefore if the complainant states a case in his bill which clearly shows that one defendant is entitled to the debt or duty, and that the other is not, both defendants may demur. The one upon the ground that the complainant has a perfect defense at law, against his claim; and the other on the ground that the complainant has neither a legal or an equitable defense to his claim, and has therefore no right to call upon him to interplead with a third person who claims without right. The Vice-Chancellor, upon any view I have been able to take of this case, was clearly right in dismissing this bill as to all the defendants. It should, however, have been dismissed without prejudice to the rights of the complainants in any future litigation with either of the defendants; so as not to conclude him upon the merits of their respective claims, which could not be legally adjudicated in this form of proceeding.

Upon the question of costs, I see no good reason why Coster and Dey should not have their costs to which they had been necessarily

subjected by the filing of this bill. But as the bill upon its face was not a proper bill of interpleader, and the rights of the parties could not be settled under it, I think all of the defendants should have demurred; instead of subjecting themselves to the useless expense of putting in answers and going into proofs, and at the same time precluding the possibility of having the case settled upon its merits, by insisting in their answers that the bill was improperly filed.

The decree dismissing the bill as to all the defendants must therefore be affirmed, but without prejudice to the complainant's rights in any future litigation with either of the defendants. But it must be modified as to costs, so as to allow to Coster and Dey the same costs which they would have been entitled to if they had demurred to the bill and the same had been dismissed upon the allowance of the demurrer. And the Chesters, instead of being allowed full costs, must only be allowed their costs to the same extent. Neither party is to have costs as against the other upon these appeals.

*(25) Dismissed
2. Plaintiff at law?*

JEW v. WOOD AND OTHERS.

IN CHANCERY, BEFORE LORD COTTONHAM, C., MARCH 27, 31, 1841.

[*Reported in Craig & Phillips 185.*]

THE plaintiff in this cause was the tenant of a house and printing office at Gloucester, formerly the property of James Wood, deceased, under whom the plaintiff had held the house, at a yearly rent, for several years previous to his death. James Wood died in the month of April, 1836, leaving real and personal estates to a very large amount. Shortly after his death two testamentary papers were set up as containing his last will, by the first of which he appointed his friends, Sir Matthew Wood, Bart., John Chadborn, Jacob Osborn, and John S. Surman, to be his executors; and by the second, which bore date two days after the first, and was attested by three witnesses, he declared his wish that his executors should have all his property which he might not dispose of, and that all his estates, real and personal, should go amongst them and their heirs, in equal proportions, subject to his debts and to any legacies which he might thereafter bequeath.

A suit having been instituted in the Ecclesiastical Court, in which the validity of those papers, as regarded the personal estate, was called in question, that court pronounced its judgment on the 20th of February, 1839, by which it refused probate of the first paper. From

*and probate of the first did not give them
a valid claim over or under present*

that judgment, however, the persons named as executors appealed to the Privy Council. In the meantime, the plaintiff had made several payments of rent to them, as devisees of James Wood, the last of such payments being made on the 3d of February, 1838, in satisfaction of the rent due on the 29th of September preceding.

On the 30th of March, 1839, the plaintiff received a written notice purporting to be given on behalf of certain persons who claimed to be co-heirs of James Wood, and requiring him to pay his rent in future to them. That notice was followed, a few days afterward, by a counter-notice from the four persons above named, requiring him to pay his rent as before to them. Under those circumstances, the plaintiff paid no more rent to any one; and on the 15th of June Sir Matthew Wood and Jacob Osborn caused distresses to be levied on the premises for their respective one-fourth shares of the rent then in arrear. On the 9th of December, 1840, the plaintiff declared in actions of replevin against those two parties and their respective bailiffs; and the defendants in those actions having respectively avowed and made cognizance, the plaintiff pleaded *non tenuit*, upon which pleas issue was joined. On the 3d of February, 1841, the defendants in those actions gave the plaintiff notice of trial for the ensuing Gloucester assizes, and, on the 9th of March following, the bill in this cause was filed against Sir Matthew Wood, Jacob Osborn, John Surman, and the devisees of John Chadborn, who was then dead, and also against the several persons who had claimed to be the co-heirs of James Wood, with the husbands of three of them who were married women, alleging that, shortly after the death of James Wood, Sir Matthew Wood, Osborn, Surman, and Chadborn, called a meeting of his tenants, which was attended by the plaintiff amongst others, and at which they represented that James Wood had made a will by which he had devised all his real estates to them, and appointed them his executors; that, upon the faith of that representation, the plaintiff paid to them the rent then due for the house and printing office, and also signed a memorandum, the exact purport of which he was unable to set forth, inasmuch as it had ever since remained in their possession, but which was alleged to be an acknowledgment of their title to the premises, as devisees of James Wood, and that his subsequent payment of rent to those persons had been made upon the faith of the same representation, no other person having made any claim upon him, in respect of the rent, previously to the notice of the 30th of March, 1839. The bill then alleged, that the co-heirs also threatened to take proceedings against the plaintiff for the rent in arrear; and it prayed that the defendants might be decreed to interplead together, and that it might be ascertained, in such manner as the court should

direct, to whom the rent of the house and printing office belonged and ought to be paid, and that the plaintiff might be at liberty to pay into court the sum of £84, being the rent which had accrued since the 29th of September, 1837, and the rent which should thereafter become due, which he thereby offered to do, for the benefit of such of the defendants as should appear to be entitled to it, and that, upon such payment, the defendants, Sir M. Wood and Jacob Osborn, might be restrained, by injunction, from further proceedings in the actions of replevin; and that all the other defendants might, in like manner, be restrained from levying any distress, and from commencing or prosecuting any action or other proceedings at law against the plaintiff, in order to compel payment of the rent which had accrued due for the premises since the 29th of September, 1837, or of the rent which should thereafter accrue due in respect thereof.

The bill was accompanied by the usual affidavit, denying collusion between the plaintiff and the defendants, or any of them.

Sir Matthew Wood, by his answer, set forth the memorandum referred to by the bill, and which was in fact an entry in a book belonging to Jacob Osborn, which entry was signed by the plaintiff, and purported to be a settlement of account between him and Sir M. Wood, Osborn, Surman, and Chadborn, on the 23d of May, 1836, for the rent due from the plaintiff on Lady-day preceding. Sir Matthew Wood then stated his belief that the plaintiff did give credit to the representations made at the meeting, and that no claim or demand of rent had, previously to that occasion, been made upon him by any other person. He then stated that he did not know whether the notice of the 30th of March was the first intimation the plaintiff received, that any person other than himself and his co-devisees laid claim to the premises; but he said he believed that the plaintiff was aware of the pendency of the suit in the Ecclesiastical Court before he made his last payment of rent, that suit having been commenced in the month of June, 1836.

Before the answer was put in, the plaintiff had obtained an *ex parte* injunction, in the terms of the prayer of the bill, upon payment into court of the amount of rent claimed.

The defendant, Sir M. Wood, after putting in his answer, moved, before the Master of the Rolls, to dissolve the injunction, but his Lordship refused the motion, and it was now renewed, by way of appeal, before the Lord Chancellor.

Mr. Turner and *Mr. Walker* in support of the motion.

A plaintiff, in a bill of interpleader, is bound to show that there is no question between himself and either of the defendants, collateral

to that upon which he calls upon them to interplead.¹ The general principle will not now be disputed ; but it will be said that the plaintiff, having originally taken possession under James Wood, continued, after his death, to be tenant to his heirs, and that he has never been tenant to the parties claiming under his will. He has, however, paid rent for two years to those parties, and it is not suggested that he has done so in consequence of any wilful misrepresentation or concealment on their part : on the contrary, he appears to have persisted in paying his rent to them, after he must have known that their title was disputed. That circumstance alone distinguishes this case from those cases at law which will be cited on the other side ; but even if those cases were not so distinguishable, their authority is considerably shaken by the case of *Hall v. Butler*,² which is the latest decision on this subject, and which, if it has not restored the old rule, that a tenant cannot, under any circumstances, be allowed to dispute the title of the person whom he has once recognized as his landlord, is sufficient, at least, to show that the point is one which admits of very nice distinctions, and on which the law is far from being accurately defined. At all events, it is not so clear that what has taken place between the plaintiff and the parties claiming under the will, has not created a new tenancy, as to justify this court in depriving the defendant, who makes this motion, of the opportunity of discussing that question before the tribunal to which it properly belongs.³

Mr. Wigram and Mr. Chapman Barber, contra.

Mr. Turner in reply.

The LORD CHANCELLOR. This is a bill of interpleader, filed by a person who is a tenant of part of the lands belonging to the late Mr. James Wood, against certain persons who claim under the alleged will of Mr. Wood, and others who claim as heirs at law. The question in contest between the co-defendants being, whether there was a good testamentary disposition of the property of the late Mr. James Wood, it would be quite a regular case for a bill of interpleader, if it were not for certain special circumstances which are stated to have taken place between the tenants of the property and those who claim to be devisees.

Sir Matthew Wood, the party who disputes this being a proper case for interpleader, states, that after the death of James Wood, there being papers found which were supposed by the defendant to pass the real estate (and which is a subject still under litigation), a meeting was called of the tenants, which was attended, amongst others, by

¹ *Crawshay v. Thornton*, 2 *Mylne & Craig* 1.

² 10 *Adol. & Ellis* 204.

³ *Powis v. Smith*, 5 *B. & Ald.* 850.

the present plaintiff. He states that, upon that occasion, the defendant and other persons, who claim as devisees, represented that they were entitled to these lands, lately the estate of James Wood, under the will made by him as before-mentioned ; and the defendant says that he believes, that the plaintiff did believe such representations to be true. Then the answer states the circumstances under which those tenants signed a paper containing an account of rent, and subsequently paid rent to those who claim as devisees, for a certain length of time after this meeting took place.

These are the circumstances, taken from the answer of the defendant, upon which the question is raised, whether this be or be not a proper case of interpleader. The Master of the Rolls considered it to be so, and restrained certain proceedings which were pending between the parties for the recovery of rent due from the tenant. The Master of the Rolls granted an injunction, as is usual in cases of interpleader, upon the plaintiff paying the rent due into court. It was objected to the order of the Master of the Rolls, that this was not a proper case of interpleader, within the principle laid down in *Crawshay v. Thornton*, because the plaintiff was under liabilities to one of the defendants, Sir M. Wood, beyond those which arose from the title to the property in question, and which no litigation between the co-defendants would therefore determine. That was the principle laid down in *Crawshay v. Thornton*, derived from the cases which I found to have established, as I thought, that rule ; and no question is raised in this case as to that doctrine. The question is, whether this case falls within it or not.

Now such liability, namely, a liability between the plaintiff and Sir Matthew Wood, independently of the question arising upon the title in contest between the co-defendants, is said to arise from the plaintiff's being precluded from disputing the title of Sir M. Wood as his landlord, upon the ground of having paid rent, and done other acts stated to amount to an attornment and acknowledgment of Sir M. Wood as his landlord. The question, therefore, is, whether the facts stated in the pleadings, or rather the answer of Sir M. Wood, show that there is a substantial question to be tried, upon that ground, between Sir M. Wood and the plaintiff ; for the mere fact of such a claim being made, and such a question being raised, cannot avail, unless it appears to the court that there is a real and substantial question to be tried. In a question of injunction, if it turns upon a matter of law or equity, the court exercises its discretion to see whether there is really a substantial question to be tried ; and if, instead of being a matter of law or equity, it be a matter of fact, it must also exercise a similar discretion.

Now, several cases were cited to show that what has taken place between the plaintiff and Sir M. Wood precluded the plaintiff, the tenant, from disputing the title of Sir M. Wood, whatever might be the result of the litigation between Sir M. Wood, claiming as devisee, and the heirs at law, who dispute the will set up on part of the devisees; and I postponed the consideration of this case till to-day that I might have an opportunity of examining those cases.

It appears to me established, by the uniform current of all the cases (for there is not that discrepancy between the cases which was suggested), that the rule of law is, that after the death of the person to whom the occupier became tenant, the tenant may require the person claiming under the original lessor to prove his title under such original lessor; and that although the tenant has paid rent to the person so claiming under the original lessor, he is not precluded from so doing by the payment of rent, and other acts which might, under other circumstances, amount to an attornment.

Several cases were cited. *Rogers v. Pitcher*¹ was one; that was a case of mere mistake as to the title of the party to whom the rent was paid. There was no misrepresentation by the party so obtaining payment of the rent: it was a mere misapprehension, and the payment of rent under such misapprehension was not considered as altering the situation of the tenant. He was permitted to call upon the person claiming his land to prove his title.

*Fenner v. Duplock*² proceeded entirely upon the tenant's ignorance of the title of the party who claimed the rent.

*Gregory v. Doidge*³ is a still stronger case: there does not appear to have been any misrepresentation; the tenant had deliberately acknowledged the party claiming as his landlord, and made an agreement with respect to the rent upon that footing; but this proving to have been done in ignorance of the title of the other party claiming, was held not to bind the tenant.

The case of *Hopcraft v. Keys*⁴ has no direct application; that decision having proceeded upon this—that the occupier did not hold under the party who claimed the rent, that party having been evicted by a title paramount, and the occupier having commenced a new tenancy under the party who so evicted his prior landlord.

The case of *Doe dem. Plevin v. Brown*⁵ was a case of attornment made by the direction of the person under whom the tenant held. The title was disputed by his assignee; but Lord Denman, in holding that the tenant was at liberty to dispute the title of the person to whom he had attorned, says that it was competent for him “to ex-

¹ 6 Taunt. 202.

² 2 Bing. 10.

³ 3 Bing. 474.

⁴ 9 Bing. 613.

⁵ 7 Adol. & Ellis 447.

plain and render inconclusive acts done under mistake or through misrepresentation"; putting, therefore, mistake and misrepresentation, for that purpose, upon the same footing.

So far I think it was admitted at the bar that the cases were uniform. But a case was referred to,¹ which, it is contended, establishes a different doctrine. Now I think the doctrine of that case is by no means inconsistent with the former cases, but completely and entirely consistent with them. In that case, the tenant took possession, and held under a person named Nevitt, who afterward directed the tenant to pay his rent in future to the defendant, Butler. Another person then claimed by title paramount to Nevitt. Butler, the defendant, was entitled to stand in Nevitt's place; and the tenant, who could not dispute Nevitt's title, was held to be equally precluded from disputing Butler's. The judges put it upon this ground, either that the defendant Butler ratified the demise, or that there was a fresh demise by him; and that in either case the tenant could not dispute Butler's title. Now it will be observed that in either case the tenant was disputing the title of the person from whom he derived his tenancy, and not the title of a party claiming through such person. There is nothing, therefore, at all inconsistent in the doctrine of that case with the doctrine of all the preceding cases.

Upon this review of the cases at law, there appears to me to be no doubt but that the plaintiff, notwithstanding what has passed between him and the defendant, Sir M. Wood, is entitled to show if he can, that Sir M. Wood is not a devisee of the original lessor, and therefore not entitled to the tenant's rent; for that there is no question between the plaintiff and any of the defendants, except that which is in dispute between the different defendants, and that this is, therefore, a proper case for interpleader.

The motion must be refused, with costs.

CHILD *v.* MANN.

IN CHANCERY, BEFORE SIR JOHN STUART, V.C., FEBRUARY 25 AND
26, 1867.

[*Reported in Law Reports, 3 Equity Cases 806.*]

MOTION for a decree. On the 6th of July, 1865, an order was made in the cause of Fortescue *v.* Mann, directing that certain costs should be paid by the plaintiff to the defendant therein. Those costs were afterward taxed at £72 4s. 2d. On the 10th of November,

¹ Hall *v.* Butler, 10 Adol. & Ellis 204.

1865, the defendant Mann sued out of this court a writ of *fi. fa.* against the goods of the plaintiff Fortescue, and lodged it with the plaintiff Child, who was at that time sheriff of Staffordshire, and he issued his warrant for levying for the above amount and interest at £4 per cent. from the 7th of November, 1865.

On the 11th of November, 1865, the goods were seized, and shortly afterward advertised for sale by auction.

On the 15th of November, the plaintiff Child was served with notice that Fortescue was, on the previous day, at the Rugeley County Court, adjudicated bankrupt, and that he must not remove or sell the goods seized.

On the 17th of November, the plaintiff Child was served with another notice that Fortescue had that day, at the Birmingham District Court, been adjudicated bankrupt, and that he must abandon the possession of the goods.

On the 18th of November, 1865, James Gardner, the Registrar of the Rugeley County Court, was appointed official assignee, and on that day he gave notice to the plaintiff Child that all dealings by him with the goods would be at his peril, and required him to pay all moneys of the bankrupt to him.

James Gardner was originally made a defendant to the bill, but he was afterward, on the motion of the plaintiff, dismissed.

The validity of the adjudication of the County Court was disputed by George Kinnear, who was appointed official assignee by the Birmingham District Court.

George Kinnear was originally made a defendant to the bill, but he also was afterward, on the motion of the plaintiff, dismissed.

On the 22d of November, the plaintiff Child was served with an order made the previous day in the case of *Fortescue v. Mann*, requiring him to make a return to the writ of *fi. fa.* On the 25th of November, 1865, the plaintiff Child sold the goods for £81 4s. 10d., and there remained in his hands, after deducting certain charges amounting to £23 8s. 9d., the balance of £57 16s. 1d.

The bill was filed by Child on the 11th of December, 1865, alleging that the defendants Mann, Gardner, and Kinnear claimed the moneys in his hands, and that all of them threatened proceedings to recover the same; and praying that he might be at liberty to pay the moneys into court to the credit of the cause of *Fortescue v. Mann*, and that the defendants might interplead. The bill also prayed for injunctions, and for costs.

On the 17th of July, 1866, the bill was amended, by stating that the adjudication by the County Court had been annulled, and that George Myatt, then made a defendant, had been appointed creditors'

assignee under the adjudication by the Birmingham District Court, and by striking out the names of the defendants Gardner and Kinnear, and inserting in their stead the name of Myatt.

Mr. Fischer, for the plaintiff, submitted that this was a proper case for a bill of interpleader by the sheriff.¹

Mr. Ince for the defendant Myatt. This bill ought not to have been filed at all. In *Hale v. Saloon Omnibus Company* there were equities between the parties which made a bill necessary. Where the question is a legal one, a court of common law ought to be resorted to, under the 1 and 2 Will. 4, c. 58, s. 6, which enables sheriffs who have levied, and where claims are made by assignees in bankruptcy and other persons, to proceed in a cheap and summary manner. There is no question to be decided here, but if there were, the sheriff ought to have proceeded under that act. In *Slingsby v. Boulton*,² a sheriff levied upon goods alleged to be in settlement, and a bill of interpleader could not be maintained. This is a similar case. The sheriff, after receiving notice of the bankruptcy, ought not to have stirred one step, for his power to sell the goods was taken away from him. The law is clearly laid down in *Crawshay v. Thornton*.³ If a creditor issues a *fit. fa.*, and sells the goods, he is not entitled to the proceeds unless the sale takes place before the filing of a petition for adjudication⁴; and the same principle was followed in *Young v. Roebuck*,⁵ where it was held that seizure by a sheriff under a *fit. fa.* is not valid as against assignees, unless it has been perfected by a sale of the goods before the filing of such a petition. The sheriff has been a wrongdoer, for long before the sale of Fortescue's goods he had notice that there had been an adjudication in bankruptcy, which gave the assignee a paramount right to the property, and the bill ought to be dismissed with costs.

No one appeared for the defendant Mann.

SIR JOHN STUART, V.C. This bill comes within the definition of interpleader stated by Lord Cottenham in *Crawshay v. Thornton*, where he said: "In equity it is defined to be where two or more persons claim the same debt or duty." Each of the defendants, Mann and Myatt, claims the fund, and the sheriff is merely a stakeholder. His fees have been paid, and the balance of the proceeds of the sale has been paid into court. The question is, to which of the defendants does this fund belong? Lord Cottenham, in *Crawshay v. Thornton*, also said, that "the case tendered by every bill of inter-

¹ *Hale v. Saloon Omnibus Company*, 4 Drew 492; *Tufton v. Harding*, 6 Jur. (N. S.) 116.

² 1 V. & B. 334.

⁴ 12 & 13 Vict., c. 106; *Hutton v. Cooper*, 6 Ex. 159.

³ 2 My. & Cr. 1.

⁵ 2 H. & C. 296.

pleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiff is not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest."

It was contended that at law the right of the assignee in bankruptcy is quite clear, and authorities have been cited to show that where goods have been seized, but have not been sold before the adjudication, the assignees are entitled. But it must be remembered that the sheriff here acted under a peremptory order of this court to make a return to the writ of *fit. fa.* The sheriff complied with that order, and then he filed this bill of interpleader, because there were conflicting claims made against him. There must be a decree that the defendants do interplead. The sheriff having done his duty, his costs must be taxed and paid out of the fund, and if it should be insufficient, then order that the defendants Mann and Myatt do pay the deficiency; but if more than sufficient, the defendant Myatt to have the surplus of the fund, and be paid his costs and the costs that he may have to pay to the plaintiff by the defendant Mann.

CHARLES DORN, APPELLANT, *v.* MENZO FOX, COLLECTOR,
ETC., IMPLEADED, ETC., RESPONDENT.

IN THE COMMISSION OF APPEALS OF NEW YORK, SEPTEMBER TERM,
1874.

[Reported in 61 New York Reports 264.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered on the report of a referee.¹

This action was brought to compel the collectors of the towns of Ava and Boonville, in Oneida County, to interplead, each of said collectors having a tax on his tax list, and a warrant against the plaintiff, who owned a farm lying partly in each of said towns.

The complaint stated, in substance, that, prior to and during the year 1869, the plaintiff was the owner and occupant of 400 acres of land, occupied by him as an entire farm, which was partly situated in Ava and partly in Boonville, no portion of it being unoccupied. Prior to April 30, 1862, he resided on that part of the farm lying in Ava; since that time he has resided on that portion of his land situ-

¹ Reported below, 6 Lans. 162.

ated in Boonville. In the year 1869, the assessors of the town of Ava assessed the plaintiff for the whole value of his farm, though he presented the requisite affidavit that his residence was not in the town. This assessment was delivered to the board of supervisors of the county, who issued a warrant for the collection of his tax, amounting to forty-one dollars and eighty-five cents. The warrant was thereupon delivered to the defendant, Fox, collector of the town of Ava, who, in that character, claims payment of such tax and his fees, and is about to proceed to enforce such payment by levy and sale of the plaintiff's property. In the same year the assessors of the town of Boonville assessed the plaintiff for the same property, on the ground that his residence was in that town, whereupon similar proceedings on the part of the officers took place as in the town of Ava, for the collection of a tax amounting to the sum of sixty-one dollars. Each of these are the annual tax for the farm of the plaintiff for the year 1869. The complaint further set forth that the plaintiff was ignorant of the respective rights of the defendants as collectors, and that he was willing to pay the tax to either of the defendants, as the court might direct, and offered to pay the money into court. There was also an allegation that the action was not brought by collusion with either of the defendants.

On this state of facts the plaintiff prayed for an injunction restraining the defendants from taking any proceedings in relation to the tax or its collection, and for a direction that the defendants should interplead.

The referee found the facts substantially as set forth in the complaint, except as to the plaintiff's ignorance of the rights of the collectors, as to which there was no finding, and decided, as matter of law, that the plaintiff has no cause of action against the defendant Graff, collector of the town of Boonville, but that the defendant Fox, collector of the town of Ava, should be restrained from enforcing the collection of the tax under his warrant.

Judgment was entered on the report of the referee accordingly, awarding a perpetual injunction, and declaring the said tax and the warrant last mentioned void and of no effect against the plaintiff or his property.

Nicholas E. Kieran for the appellant.

C. D. Adams for the respondent.

DWIGHT, C. The defendant claims that a bill of interpleader will not lie in the present case, on two grounds. One is, that the plaintiff was not ignorant of his rights; and another, that, on the merits of his case, he has no right of action.

It is only necessary to consider whether a bill of interpleader will

lie as against the two collectors, to establish his rights. That the assessors of the town of Ava have violated them has already been affirmed in a case decided at the present term of this court.¹ It is now settled law that assessors act at their peril in determining a jurisdictional fact. By finding that the plaintiff resides in Ava they gain no control over the subject, unless he does, in fact, reside there. When that point is in dispute, it must ultimately be decided by the courts. The referee has found, as a fact, in the present case, on undisputed evidence, that the plaintiff, when the tax was levied, resided in Booneville. The assessors of the town of Ava, therefore, had no power to assess a tax over the plaintiff's farm, and their proceeding was wholly void.

The action of interpleader was well brought. The authorities upon this subject distinguish between a strict bill of interpleader and a bill in the nature of an interpleader. These are governed by rules differing to some extent. In a strict bill of interpleader the following ingredients are necessary: 1. Two or more persons must have preferred a claim against the plaintiff. 2. They must claim the same thing, whether it be a debt or duty. 3. The plaintiff must have no beneficial interest in the thing claimed. 4. It must appear that he cannot determine, without hazard to himself, to which of the defendants the thing, of right, belongs. There must also be an offer to bring the money or thing in dispute into court.

In the bill, "in the nature of an interpleader," the same strictness is not required. Other elements of an equitable nature may enter into the case, and the jurisdiction of the court may be derived from these. The distinction is well pointed out in *Mohawk & Hudson Railroad v. Clute*.² The present action was brought upon the theory of a strict bill of interpleader. There was an allegation in the complaint that the plaintiff was ignorant of the respective rights of the collectors. This statement was denied in the answer, and the referee made no finding upon the subject. Such ignorance must be shown, or, at least, it must appear that there is some doubt to which of such claimants the debt or duty belongs, so that he cannot safely pay or render it to one without some risk of subsequently being made liable for the same debt or duty to the other.³

I think that, as matter of law, there was sufficient doubt upon this question, when the action was commenced, to bring it within the rule. At that time, according to the test suggested in *Mohawk & Hudson Railroad v. Clute*,⁴ the plaintiff could not have safely rendered the tax to one of the collectors without some risk of subsequently being made

¹ *Dorn v. Backer*, 61 N. Y. Rep. 261.

² 4 Paige 385, 392, 393.

³ *Mohawk & Hudson R.R. v. Clute*, *supra*.

⁴ *Supra*, p. 392.

liable to pay the tax to the other. It is true that the amount of the tax was not the same in the two towns. In one of them it was forty-one dollars and eighty-five cents, and in the other sixty-one dollars. The duty is, however, the same, as it grows out of the statutory power of assessors to levy taxes. The same fact existed in the case just cited ; and the court presumed that the plaintiff had paid into court the largest sum assessed upon him, so as not to violate the settled rule in this class of cases, that he cannot litigate any part of the claim of either defendant.¹ To show that the authority of assessors to decide a jurisdictional fact was not fully settled when this action was brought, reference may be made to the following cases : *Weaver v. Devendorf*,² *Smith v. Brown*,³ *Barhyte v. Shepherd*,⁴ and *Dorn v. Backer*.⁵ In this last case the General Term of the fourth department—Justice Johnson delivering an elaborate opinion—held, in 1872, upon this very question now under consideration, that the action of the assessors of the town of Ava was final. He distinguished the case from that of *The People v. Supervisors of Chenango*⁶ and *Mygatt v. Washburn*.⁷ His view was, that as the assessors had jurisdiction over the subject-matter (a large portion of the farm lying in that town), and that as they were called in the discharge of their duty to decide the fact of Dorn's residence, they were not liable to an action for a redress of any injury occasioned by their error of judgment. On the other hand, he claimed that, in *Mygatt v. Washburn*, the person who was assessed was in fact a non-resident ; and, therefore, the assessors acted wholly without jurisdiction. Though this distinction is now untenable, it could not be considered as clearly so when this action was brought in 1870, since it was maintained by persons of so much judicial experience and ability as Judges J. A. Johnson, Talcott, and Mullin, and had not then been passed upon and discarded by the appellate court. The rule requiring that, in actions of interpleader, the plaintiff should be in doubt as to which of the claimants is in the right, must be construed in a reasonable manner. It of course excludes all cases where the rights of parties are clearly settled. On the other hand, so long as a principle is still under discussion, and the appellate branch of the Supreme Court has reached conflicting opinions, it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader.

If, however, I am wrong in this view of the case, there is sufficient authority for holding that the plaintiff may sustain his action as a “bill in the nature of an interpleader.” There are sufficient allegations in

¹ P. 391.

² 3 Denio 117.

³ 24 Barb. 419.

⁴ 35 N. Y. 238.

⁵ *Supra.*

⁶ 11 N. Y. 563.

⁷ 15 Id. 316

the complaint for that purpose. The plaintiff in that action does not simply claim that he is a stockholder, or that he owes a duty to one of two distinct claimants. He may show, in such a case as is now under discussion, that, by reason of conflicting claims, his property is in danger of being sacrificed. He may insist that he has an equitable right to have relief from the effects on his property of an illegal assessment. If the statute makes the tax a lien on his land, he may urge that it is a cloud on his title. If it be personal property, he may assert that it is in danger from the rival claims of the collectors. Assuming that the warrants are regular in point of form, each collector would be protected as to his acts done under them. Should it be said that the plaintiff may sue the assessor for his wrongful act, the answer is that the law does not confine him to so uncertain a remedy. Complete justice is done by bringing both claimants before the court, ordering the amount of the lawful tax to be paid over to the party who turns out to be in the right, restraining the rival collector from further proceedings, and declaring the unauthorized tax, as well as the warrant for its collection, illegal and void. These propositions are clearly supported by the case of *Redfield v. The Supervisors*.¹ In this case, a person having been taxed in two different places for what was claimed to be the same property, filed a bill of interpleader to compel a settlement of the right of taxation as between the parties assuming it. It was filed against the supervisors of two counties, the constituted authorities for the levying of the tax, before they had issued their warrants for its collection. In this respect the case differed from that of *Mohawk & Hudson R.R. Co. v. Clute*,² and *Thomson v. Ebbets*,³ since, in those cases, the bill was filed against the collectors after the assessment rolls had been placed in their hands. The court held that this difference had no effect on the principle. The court then proceeded to consider the case, and on an examination of it held that the bill could not be sustained as a strict bill of interpleader for two reasons: 1st, that the contesting towns in the respective counties did not happen to claim the very same matter or thing; 2d, that there was no legal doubt as to the party who was in the right. Having disposed of the cases in that aspect, the court proceeded to inquire whether the bill could not be upheld as being in the nature of an interpleader and for relief? The relief was protection against an illegal assessment, or one proceeding on mistaken principles. In considering the case from this point of view, the court decreed that the complainants should pay such taxes as were found to have been properly assessed, and as to the residue, directed that the "complainants be discharged from the

¹ 1 Clarke 42; affirmed by the Chancellor, 3 Ch. Dec. 92.

² *Supra.*

³ 1 Hopk. 272.

payment thereof by reason of the errors or mistakes of the assessors of that town,"¹ "in the principles of the assessment adopted by them." The first paragraph of the reporter's syllabus in this case is not strictly accurate. It would lead to the conclusion that an element of doubt was deemed to be requisite in a "bill in the nature of an interpleader." An examination of the report will, however, show that this is not so,² and that the court, after deciding that there was no doubt in the case, maintained the bill on "other equitable grounds." The court said: "The complainants, from their own showing in this case, have satisfied me that the towns in Erie and Genesee, exclusive of Le Roy, are entitled to the tax claimed by them, and they ought not to be subjected to the delay and expense of a chancery suit before they can be permitted to receive what is their just due. But in this case there are other grounds of equitable jurisdiction, as the complainants claim protection against illegal assessments."

The same general doctrine is deducible from *Mohawk & Hudson R.R. Co. v. Clute*, etc., before cited. That was also an action of interpleader brought by a party taxed in two different towns for the same property, which was only liable to be taxed once. The court held that the only ground on which the court assumes jurisdiction in a strict bill of interpleader is the danger of injury to the plaintiff from the doubtful rights and conflicting claims of the several defendants as between themselves. The plaintiff must accordingly state his own situation in reference to the fund in question, or as to the duty to be performed, and the nature of the claim of the defendants; and if, on this showing, there can be no doubt, the party who is entitled to the debt is not to be subjected to the delay and expense of a chancery suit. On the other hand, where there are other grounds of equitable relief, he may file a bill in the nature of an interpleader against both of the claimants. See also *Thomson v. Ebbets*,³ where an action was brought by a tax-payer to compel the collectors of different towns in which the plaintiff was taxed for the same property to interplead.

On the whole, the result is that the present action may be supported either as a strict action of interpleader or as one in the nature of an interpleader; and the plaintiff, having offered to pay the money into court, was entitled to relief in accordance with his proof. The testimony having clearly shown that his residence was in Boonville, he was rightfully taxed there, and the assessment in Ava was illegal and void.

The regular course in the present case, considered as a strict bill of interpleader, would seem to have been not to have dismissed the

¹ *Le Roy.*

² See p. 48.

³ 1 *Hopk.* 272.

action as against the collector of the town of Boonville, but to have entered judgment in his favor for the amount of the tax. The bill should pray that the defendants may interplead, so that the court may adjudge to whom the money or property belongs.¹ All the parties were before the court, and the cause was heard on its merits, and the whole subject should have been disposed of according to the equities of the case. The successful contestant thus has the benefit of a judgment, and may receive his lawful dues by force of it. On any other theory, there appears to be no reason for requiring, on the part of the plaintiff, an offer to pay the money into court. That would indeed be an idle ceremony if the plaintiff is not to pay it over to the party who is found to be entitled to it. And yet it is a condition precedent to relief that the money should be brought in.² This view is not in opposition to the result in *Mohawk R.R. Co. v. Clute*, since in that case there was no decision at the hearing, but only upon an order to show cause. That part of the judgment in the present action which dismissed it as against the collector of Boonville was, however, not appealed from, and there appears to be nothing to prevent the collector of that town from enforcing the tax in such manner as he may be advised.

The judgment of the General Term should be reversed, and that entered on the report of the referee should be affirmed.

All concur.

Judgment accordingly.

ANDREW J. SPRAGUE AND OTHERS *v.* JOHN C. WEST,
ADMINISTRATOR, AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER
24, 1879.

[*Reported in 127 Massachusetts Reports 471.*]

BILL IN EQUITY, in the nature of a bill of interpleader, by Andrew J. Sprague, Elizabeth A. Sprague, his wife, and their minor child, legatees under the will of Elizabeth R. French, against the administrator with the will annexed of said Elizabeth R., Timothy H. French, her husband, and the other legatees under the will, except Hattie Augusta French, the adopted child of the testatrix. The administrator and the husband demurred to the bill for want of equity; the

¹ 2 Barb. Ch. Pr. 122; *Redfield v. Supervisors, supra*, 49.

² 2 Barb. Ch. Pr. 122, and cases.

demurrer was sustained ; and the plaintiffs appealed to the full court. The material allegations of the bill appear in the opinion.

J. M. Barker for the defendants.

E. M. Wood for the plaintiffs.

SOULE, J. Elizabeth R. French, by her will, after giving certain money legacies, gave the residue of her estate to the plaintiff, Andrew J. Sprague, and to Hattie Augusta French, the adopted child of herself and husband. No child was born to the testatrix. Her personal estate was insufficient to pay the legacies, and the administrator with the will annexed obtained from the Probate Court, on due proceedings for the purpose, a license to sell all the real estate of the testatrix for payment of legacies, and advertised said estate for sale.

The plaintiffs bring this bill, alleging that the husband of the testatrix claims a life estate in the land, under the statutes of the Commonwealth, and alleging that they are advised that he has not such estate, and that by reason of his claim the land will not sell for its real value, and may not produce enough to pay the legacies ; and asking that the administrator be enjoined against proceeding with the sale at the time to which it is adjourned ; and that the legatees and the husband of the testatrix be required to interplead, and that their rights may be determined in this suit. The bill alleges that the construction of the will is doubtful, that the administrator ought to have brought a bill in the nature of a bill of interpleader, but, though requested, has refused so to do.

We are of opinion that the demurrs are well taken. The allegations as to the uncertainty about the true construction of the will, and the conflicting claims as to whether the husband is entitled to a life estate in the land or any part of it, or not, were matters proper to be presented to the Probate Court for its consideration, on the petition for leave to sell, in order that the license might not be granted till the parties should have an opportunity to settle the question of the husband's rights by proceedings appropriate for the purpose. Any party aggrieved by the granting of the license to sell might have appealed to this court as the Supreme Court of Probate, and might have presented these reasons for refusing the license for consideration at the hearing of the appeal. The plaintiffs did not see fit to take that course. Under these circumstances, this court sitting as a Court of Equity cannot interfere by injunction to prevent the administrator from proceeding, in a regular and proper manner, to avail himself of the license granted by the proper tribunal for the purpose of enabling him to perform his duty.

Whatever interest the husband has in the land is a legal estate. Whatever interest the residuary legatees have in the land is a legal

estate. The administrator has no title to the land, and no right to meddle with it, except by virtue of his license to sell for the payment of legacies. There are but two parties claiming any title to the land : the residuary legatees on the one hand, claiming under the will, and the husband on the other hand, claiming notwithstanding the will. The rights of these parties cannot be settled in a bill in equity in the nature of a bill of interpleader. The cases cited by the plaintiffs do not sustain their position. It is well settled that a trustee under a will may bring his bill in the nature of a bill of interpleader, and obtain instruction from the court as to his duty, when different parties are making adverse claims in relation to the trust property, and he is in doubt as to their rights. Or he may refuse to act in favor of either, and leave them to bring their bill against him for failing to execute his trust ; but it is nowhere held that a party in interest under a trust can maintain a bill, in the nature of a bill of interpleader, against the trustee and an adverse claimant under the trust. And, if he could, that case would not be the case at bar, because there is no claim here that the administrator is not proceeding in the regular and ordinary way in the performance of his duty. The claim is merely that, because of an uncertainty as to the rights of the husband in the real estate of the testatrix, there is danger that her land will not bring a fair price at auction, and that the plaintiffs, who have neglected the opportunity which the statutes gave them to bring the question of licensing the administrator to sell before this court by appeal, have the right to protection in equity against the consequences of their own neglect.

Bill dismissed.



THIRD NATIONAL BANK OF BOSTON *v.* SKILLINGS,
WHITNEYS & BARNES LUMBER COMPANY AND
ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
4, 1882.

[Reported in 132 *Massachusetts Reports* 410.]

MORTON, C. J. This is a bill of interpleader, the substantial allegations of which are that Edward Babson, Jr., delivered a draft upon New York to the plaintiff bank for collection; that it collected the draft and placed the amount to the credit of said Babson, who had an open account with the bank; that the Skillings, Whitneys & Barnes Lumber Company contends that said draft was held by Babson as its agent, and was its property, and that the proceeds belong

to it; and that the executrix of said Babson, who has deceased, contends that the proceeds belong to his estate.

We are of opinion that this does not present a proper case for a bill of interpleader.

There is no privity between the plaintiff and the Skillings, Whittneys & Barnes Lumber Company. That corporation does not claim the fund in the hands of the plaintiff through any privity with Babson, but by a title paramount and adverse to his. The bank is not a mere stakeholder, but is the debtor of Babson, standing in privity with him alone.¹

The authorities support the rule that in such a case a bill of interpleader will not lie, but the remedy of the parties is at law. Such bill will lie only when two parties claim of a third the same duty or debt by virtue of some privity existing between them.

Thus, if a person deposit property or money in the hands of another, not as a stakeholder for both parties, but as his agent or bailee, and the property is claimed by a third person under an independent title, the agent or bailee cannot maintain a bill of interpleader.²

So where a tenant is liable to pay rent, and a third person claims it by a title independent of the landlord, the tenant cannot maintain a bill of interpleader. But if the third person claims under the landlord, so that the question arises from the act of the landlord, this creates a privity with the tenant, and the bill will lie.³

So a sheriff who has seized property upon execution, cannot maintain a bill of interpleader to determine whether the execution debtor or a third person claiming it is entitled to the property, as their claims against him are not of the same character or in the same right.⁴

Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, after reviewing the authorities, says: "The true doctrine, supported by the authorities, would seem to be, that, in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader."⁵

This rule is applicable in the case at bar. The only relation of the plaintiff to the defendants is that it is the debtor of one of them.

¹ Carr *v.* National Security Bank, 107 Mass. 45.

² 2 Story Eq. Jur. §§ 816, 817, and cases cited.

³ Dungey *v.* Angove, 2 Ves. Jr. 304; Cowtan *v.* Williams, 9 Ves. 107; Clarke *v.* Byne, 13 Ves. 383.

⁴ Shaw *v.* Coster, 8 Paige 339.

⁵ 2 Story Eq. Jur. § 820.

A debtor cannot deprive his creditor of his remedies at law, and force him into equity, merely because a third person claims the fund or debt by a title not derived from the creditor. His remedy is at law, and it would seem that, if either of the claimants should sue him, he could protect himself by notifying the other claimant to come in and defend the suit; and that he, being the real party in interest, would be bound by the judgment.

The plaintiff contends that this bill may be maintained under the Gen. Sts., c. 113, § 2, cl. 6. But this statute does not apply. It was not intended to enlarge the right to bring a bill of interpleader strictly so called, but to enable a party to a controversy to bring a bill in the nature of a bill of interpleader, to adjust the whole matter in controversy in a case where a judgment at law between two of the parties would leave open to one or both a controversy with a third party.¹

Bill dismissed.

M. Williams and C. A. Williams for the plaintiff.

W. B. Durant for the defendant corporation.

T. M. Babson for the executrix of Babson.

NATIONAL LIFE INSURANCE COMPANY *v.* ELIZABETH
PINGREY AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
31, 1886.

[Reported in 141 Massachusetts Reports 411.]

BILL OF INTERPLEADER, against Elizabeth H. Pingrey and Cara L. Pingrey, to determine the respective rights of the defendants under two policies of insurance issued by the plaintiff. The case was heard by W. Allen, J., and reported for the consideration of the full court, in substance as follows:

The plaintiff, on May 25, 1874, issued its policy of insurance upon the life of Franklin A. Pingrey, on his application, he at that time being twenty-one years of age, containing the following clauses:

"As soon as the premiums paid, together with such other sums as he may choose to pay, improved annually at the average rate of interest received by the company after deducting *pro rata* expenses and losses, shall amount to the sum insured, the company agrees to pay to Franklin A. Pingrey the amount of three thousand dollars.

"In case of prior death, the said company do hereby promise to

¹ *Angell v. Stone*, 110 Mass. 54; *McNeil v. Ames*, 120 Mass. 481

and agree with the assured, his executors, administrators, and assigns, well and truly to pay at their office the said sum insured to his mother, Elizabeth H. Pingrey, within ninety days after due notice and proof of the death of the said Franklin A. Pingrey, during the continuance and before the termination of this policy."

On January 25, 1882, Franklin A. Pingrey surrendered said policy to the plaintiff, who, at his request, issued to him another policy, containing similar provisions to those set forth above, except that this policy was payable to Cara L. Pingrey, the wife of said Franklin A., instead of to said Elizabeth H.

No new application for insurance was made by Franklin A. Pingrey, but, upon the surrender of the first policy for cancellation, the second policy was issued, with the following indorsement upon it: "Original Pol. No. 9372 was issued May 25, 1874, of which this is a continuation and is entitled to all its benefits." Elizabeth H. Pingrey never consented to the surrender of the first policy.

All the premiums on both policies were paid by Franklin A. Pingrey, the assured, when they came due, his mother, said Elizabeth H. Pingrey, and his sister together furnishing him with all, or nearly all, the money necessary to pay the first premium on the first policy; but it did not appear how much of the money for said premium was furnished by his mother and how much by his sister. It did not appear that any other sums besides the premiums were paid upon either of said policies.

Some time after taking out the first policy, Franklin A. informed his mother that he had taken it out, but she never saw it until about two years after the time of its issue, when one day he took it from the box where he had always kept it, as he was putting away other papers, and, holding it up, folded, told her that it was the policy; she never read the policy or knew its provisions, except that she understood from her son that he had taken out a policy for her benefit.

The insured always kept possession of said original policy until he surrendered it to the company to be cancelled as aforesaid, and he never delivered it to his mother.

On February 26, 1880, the assured married Cara L. Pingrey, and on September 30, 1882, he died without issue.

At the time when the first policy was applied for, the assured, being then just twenty-one years of age, was living at home with his father and mother, with whom he had lived up to that time, and continued to live until his death, the family at that time consisting of his father, mother, sister, and himself. His father was an invalid, and so continued until his death, which was after the death of the assured, and the household expenses were paid principally by his mother, who

took boarders. The assured paid no board before May, 1876; from that time until October, 1880, he paid three dollars per week to his mother; and after October, 1880, until his death, he paid her eight dollars per week.

From the time of his marriage, on February 26, 1880, until his death, his wife lived with him and his parents, assisted in the affairs of the house, and lived as one of the family.

The first policy was obtained, after consultation between the assured and the other members of the family, with the intention of giving his mother the benefit thereof, he at that time being unmarried.

H. G. Nichols for Cara L. Pingrey.

R. Stone for Elizabeth H. Pingrey.

C. ALLEN, J. The questions arising between the plaintiff and the different defendants cannot all be tried in an issue between the two defendants alone. The mother claims to be entitled under the first policy. The widow claims under the second policy. By issuing the two policies, the plaintiff has exposed itself to both of these claims, and must meet them as best it may. The difficulty of maintaining the bill of interpleader is not technical, but fundamental. In this form of proceeding, we cannot inquire whether the plaintiff has incurred a double liability. That result is possible. The plaintiff ought to be in a position to be heard upon the question; but on a bill of interpleader, which assumes that the plaintiff is merely a stakeholder, the plaintiff cannot be heard.¹ A plaintiff cannot have an order that the defendants interplead, when one important question to be tried is, whether, by reason of his own act, he is under a liability to each of them.²

Bill dismissed.

¹ *Houghton v. Kendall*, 7 Allen 72.

² *Cochrane v. O'Brien*, 2 J. & Lat. 380; *Desborough v. Harris*, 5 De G., M. & G. 439; *Baker v. Bank of Australasia*, 1 C. B. (N. S.) 515. See also *Story Eq. Pl.* § 291 *et seq.*; 3 *Pom. Eq.* § 1320 *et seq.*

DAVID H. CRANE, RESPONDENT, *v.* MARTHA McDONALD,
IMPLEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, SECOND DIVISION,
MARCH 11, 1890.

[*Reported in 118 New York Reports 648.*]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This was an action of interpleader.

The complaint alleged in substance and the trial court found that the following facts existed, when the action was commenced: The plaintiff held in his hands the sum of \$808 then due from him upon a contract that he had entered into with one Jennie L. Graves. At the same time the defendant, Martha McDonald, who is the mother of said Jennie L. Graves, claimed said sum as the assignee of the latter's interest in said contract and had brought an action against the plaintiff to recover the same. The defendant, George E. Goodrich, as administrator, etc., of Milo Goodrich, deceased, also claimed said sum on the ground that he had an attorney's lien thereon and said defendant had obtained an attachment pursuant to which the sheriff of Cortland County had levied upon the claim in question and had forbidden the plaintiff to pay said money to Mrs. McDonald or to any one except himself. The plaintiff was ready to pay it into court to abide the event of any action between the defendants and was willing to pay it to either upon being indemnified and had so notified them, but both had refused to indemnify him. He could not, without hazard, pay the same to either and he was not in collusion with either, but in good faith desired that they should settle the matter between themselves.

Before this action was commenced plaintiff paid the amount involved into court, pursuant to an order made at Special Term, to abide its decision as to who was entitled thereto.

The court found, as a conclusion of law, that this was a proper case for an interpleader and for an injunction perpetually restraining Mrs. McDonald from the further prosecution of the action brought by her against the plaintiff.

Defendant McDonald alone appealed from the judgment of the Special Term.

Matthew Hale, A. Pond, and W. B. French for Martha A. McDonald, appellant.

A. P. Smith for respondent.

VANN, J. The material allegations in a bill of interpleader, according to an early decision by the Court of Errors, are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the defendants the thing belongs.¹ It was also held in that case that the complainant should annex to his bill an affidavit that there is no collusion between him and any of the parties and that he should bring the money or thing claimed into court so that he could not be benefited by the delay of payment which might result from the filing of his bill. This method of procedure, in substance, still prevails.² The plaintiff insists that he has conformed to the practice thus laid down in every particular, while the appellant contends that the complaint is not sufficiently specific with reference to the claims of the defendants, and that no privity is shown between them in relation to their respective demands.

The complaint describes the claim of the defendant McDonald more fully than that of the defendant Goodrich, because the former had sued him and had thus furnished him with a definite description. While the claim of the latter was not clearly nor fully described, enough was set forth to show that it was not a mere pretext, but that it apparently rested upon a reasonable and substantial foundation. If the appellant desired that it should be made more definite and certain, his remedy was by motion under section 546 of the Code of Civil Procedure.³ Upon the trial, according to the old chancery practice, as it appeared by the answers of the defendants that each claimed the fund in dispute, no other evidence of that fact was required to entitle the plaintiff to a decree.⁴

In this case, however, the point was not left to be determined by the pleadings, but evidence was introduced upon the subject and it appeared that at least a fair doubt existed as to the rights of the conflicting claimants. It was not necessary for the plaintiff to decide, at his peril, either close questions of fact or nice questions of law, but it was sufficient if there was a reasonable doubt as to which claimant the debt belonged. When a person, without collusion, is subjected to a double demand to pay an acknowledged debt, it is the object of a bill of interpleader to relieve him of the risk of deciding who is entitled to the money. If the doubt rests upon a question of fact that is at all serious it is obvious that the debtor cannot safely decide it

¹ Atkinson *v.* Manks, 1 Cow. 691, 703.

² Dorn *v.* Fox, 61 N. Y. 268.

³ Neftel *v.* Lightstone, 77 N. Y. 96.

⁴ Balchan *v.* Crawford, 1 Sandf. Ch. 380.

for himself, because it might be decided the other way upon an actual trial, while if it rests upon a question of law, as was said in *Dorn v. Fox*,¹ "so long as a principle is still under discussion . . . it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader." Although the claim of Mr. Goodrich has since been held untenable by this court,² it does not follow that no doubt existed when this action was commenced, because the Supreme Court, both at Special and General Term, held that it was valid and attempted to enforce it. This conflict in the decisions of the courts show that the adverse claims of the defendants involved a difficult and doubtful question and is a conclusive answer to the contention of the appellant that the plaintiff did not need the aid of an action of this character. Was it possible for him to safely decide a point so intricate as to cause those learned in the law to differ so widely?

The law did not place so great a responsibility upon him, but provided him with a remedy to protect himself against the double liability, or, to speak more accurately, against a double vexation on account of one liability.³

It required, however, that he should act in good faith, and he insists that he furnished ample evidence upon that question. He offered to pay the money to Mrs. McDonald if she would indemnify him against the claim of Mr. Goodrich, but she refused to do so, and commenced an action to recover the amount involved. A like offer to Mr. Goodrich upon the condition that he should furnish indemnity was declined, and legal proceedings were threatened. Neither defendant would recede from the position thus taken, but both persisted in their respective demands. The plaintiff thereupon paid the money into court pursuant to its order, and then commenced this suit annexing to his complaint, in addition to the usual verification, an affidavit stating that the action was brought in good faith and without collusion with either defendant or with any person "in their behalf." It did not appear that he had attempted to favor the position of either claimant. These facts, with others appearing in the record, furnished adequate support to the conclusion of the trial judge that the plaintiff acted in good faith.

¹ 61 N. Y. 270.

² *Goodrich v. McDonald*, 112 N. Y. 157.

³ *Dorn v. Fox*, *supra*; *Caulkins v. Bolton*, 31 Hun 458; 98 N. Y. 511; *Johnston v. Stimmel*, 89 N. Y. 117; *Schuyler v. Pettisser*, 3 Edw. Ch. 191; *Bedell v. Hoffman*, 2 Paige 199; *M. & H. R.R. Co. v. Clute*, 4 Paige 384; *Bell v. Hunter*, 3 Barb. Ch. 391; *Badeau v. Tyler*, 1 Sandf. Ch. 270; *German Ex. Bank v. Comm'r's of Excise*, 6 Abb. (N. C.) 394; *B. & M. R.R. Co. v. Arthur*, 10 Id. 147; *Pomeroy Eq. Jur.* §§ 1320-1327; *Story Eq. Jur.* §§ 800-824.

The appellant contends that no such privity was shown to exist between the defendants as to authorize the plaintiff to bring an action to cause them to interplead.

While the early authorities were exacting upon this subject, many of the later cases have been less rigid, and some have ignored it altogether. The doctrine seems to have been abrogated in England, partly by statute and partly by judicial decisions. Mr. Pomeroy, referring to the rule, says that "it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be and is exposed to danger, vexation, and loss from conflicting independent claims to the same thing, as well as from claims that are dependent, and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands."¹

Our statutory interpleader by order apparently does not recognize the doctrine.² A somewhat similar statute in England led the courts of that country to declare that they no longer felt bound, even in an equity action, by the narrow principle previously laid down.³ It is not necessary, however, for us to decide whether the rule still exists, or to what extent it exists in this State, because, according to the most exacting authorities, where the adverse titles of the claimants are both derived from a common source, it is sufficient to authorize an interpleader. Such is the case under consideration. Mrs. Graves, as the owner of the contract in question and of the money that was invested therein, was the common source of title to both defendants. The title of Mrs. McDonald, as claimed, for it is the claim only that is here material, was by assignment of the legal title from Mrs. Graves, while the claim of Mr. Goodrich was by an equitable assignment from the same person. Each defendant, acknowledging the original title of Mrs. Graves, claimed the same debt under her, and the title of each was, therefore, derivative, as that word is used with reference to this subject.⁴

The plaintiff held the money to discharge the debt substantially as a stakeholder, having no beneficial interest therein and being under no independent liability to either claimant. He does not deny the title of Mrs. Graves, but, affirming it, places himself upon the uncertainty as to which of the two persons claiming from her is entitled to receive the fund.

Whether the claim of Mr. Goodrich was based on a lien by contract, or a lien by attachment, or both, it originated with Mrs. Graves

¹ Pomeroy Eq. Jur. § 1324, note

² Code Civ. Pro. § 820.

³ Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. Div. 450.

⁴ Pomeroy Eq. Jur. § 1327.

who at one time owned all that was claimed by either defendant. His lien had been sanctioned by a decree of the Supreme Court nearly a year before the trial of this action, and, although that judgment was subsequently reversed, it was still in force when the judgment now under review was rendered.

The lien of the attachment, as it was claimed to exist, arose after the covenant to pay the sum in question was entered into by the plaintiff, and, although that lien also was subsequently held invalid, it was sufficient to support an action of interpleader and is a complete answer to the contention of the appellant that this suit was not regularly brought, owing to the contractual relation between herself and the plaintiff.

If the actual truth were a defense to a bill of interpleader, the argument of the appellant would be conclusive, but necessarily the plaintiff in such an action has the right to rely upon what is claimed to be true, as otherwise the remedy would be of no value.

After carefully examining all of the exceptions involving questions of law, we think that none of them were well taken; and that the judgment appealed from should be affirmed with costs.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

GEORGE F. BASSETT ET AL., APPELLANTS, *v.* FRANK
LESLIE, ETC., RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 28, 1890.

[*Reported in 123 New York Reports 396.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 16, 1890, which affirmed a judgment entered upon an order of Special Term sustaining a demurrer to the complaint interposed by defendant Leslie.

The complaint alleged, in substance, these facts: Plaintiffs, who were copartners doing business in the city of New York, were dealing with and making purchases from the firm of Henry Alcock & Co., of which firm Henry and John Alcock were copartners. By the terms of the agreement between them, plaintiffs were to have credit to the amount of £2,000; for any excess of purchases above that amount Alcock & Co. were to draw on the American Exchange in Europe (Limited), with which corporation plaintiffs had arranged that when drafts were so drawn it would accept and then draw its

drafts upon plaintiffs, payable about twenty days previous to the maturity of the drafts so drawn upon it ; that plaintiffs would accept and pay the drafts so drawn upon it by the corporation at maturity, in order to place it in funds with which to meet the drafts of Alcock & Co. In accordance with said agreement, on or about March 28, 1888, Alcock & Co. drew upon said corporation at ninety days, for £344 8s. and 3d., which draft was presented to and accepted by the corporation, and thereupon Alcock & Co. delivered to said corporation a bill of merchandise which had been ordered by plaintiffs. On April 9, 1888, said corporation drew upon plaintiffs, at sixty days, to cover the amount of the draft so drawn upon it, which draft plaintiffs accepted ; at the time of acceptance said corporation delivered to plaintiffs the aforesaid bill of merchandise ; plaintiffs, however, were required to and did sign a trust receipt agreeing to sell the merchandise for account of the corporation, the proceeds to be applied to the payment of said draft. Before the maturity of the draft so drawn upon said corporation it became and has been since wholly insolvent and its property has gone into the hands of a receiver. When said draft became due it was presented for payment, and payment was demanded and refused. The draft so drawn upon and accepted by plaintiffs was transferred by said corporation to the defendant Frank Leslie, who now claims to be the owner and holder thereof, but the same was not transferred to said defendant for full value or in the usual course of business, and he parted with no money or value in consideration of the transfer, but the sole consideration therefor was a pre-existing indebtedness of the corporation to him. The complaint further alleged that Leslie, claiming to be the owner of said draft, had commenced an action for the recovery of the amount thereof against plaintiffs, and that Alcock & Co. had also commenced an action against them for the amount of said bill of merchandise, both of which actions were still pending and undetermined ; that plaintiffs admit their indebtedness for the merchandise so received by them to the amount of the draft drawn upon them, and "are ready and willing to pay the same, but they cannot determine, without hazard to themselves, to which of the defendants the right to receive such payment belongs." The relief asked was that plaintiffs may be at liberty to pay the amount into court ; that the defendants Leslie and Alcock & Co. may be decreed to interplead touching their said several claims, and that they be restrained from maintaining their said actions, etc.

Joseph A. Shoudy for appellant.

C. E. Rushmore for respondent.

EARL, J. This is an action of interpleader, and the plaintiffs

prayed judgment that the defendants might be decreed to interplead touching their several claims, and that the plaintiffs might be at liberty to pay the sum admitted by them to be due into court, and that both defendants might be perpetually enjoined from the further prosecution of actions commenced by them against the plaintiffs. As the case is presented by the demurrer to the complaint, we must assume that all the facts alleged therein are true.

This under the old chancery practice would have been called a strict bill of interpleader, and to maintain such an action it is necessary to allege and show that two or more persons have preferred a claim against the plaintiff; that they claim the same thing, whether a debt or a duty; that the plaintiff has no beneficial interest in anything claimed, and that it cannot be determined without hazard to himself to which of the two defendants the money or thing belongs. There must also be an offer to bring the money or thing into court.¹ Such an action always supposes that the plaintiff is a mere stakeholder for one or the other of the defendants who claim the stake, and the case must be such that he can pay or deposit the money or property into court, and be absolutely discharged from all liability to either of the defendants, and thus pass utterly out of the controversy, leaving that to proceed between the several claimants; and an action of interpleader cannot be sustained where, from the complaint itself, it appears that one of the claimants is clearly entitled to the debt or thing claimed to the exclusion of the other.²

Upon the facts alleged in this complaint it is entirely clear that the plaintiffs are indebted to Alcock & Co. Goods were purchased by them of Alcock & Co., and delivered by the latter in precise conformity with their agreement. It was arranged that Alcock & Co. should procure payment for the goods by means of a draft drawn upon the American Exchange, which was again to be reimbursed by a draft drawn by it upon the plaintiffs. There is no allegation in the complaint that Alcock & Co. took the accepted draft drawn upon the exchange in payment of their goods, and there can be no presumption from any facts alleged in the complaint that they did. It is, therefore, clear that the plaintiffs are indebted to Alcock & Co., and that upon the facts alleged in the complaint they have no defense to the action brought by them for the price of the goods. It is also clear, from the facts alleged in the complaint, that Frank Leslie has no claim whatever against the plaintiffs upon the draft held by her. That draft was drawn by the American Exchange upon the plaintiffs

¹ M. & H. R.R. Co. *v.* Clute, 4 Paige 384; Dorn *v.* Fox, 61 N. Y. 268; B. & O. R.R. Co. *v.* Arthur, 90 Id. 234.

² M. & H. R.R. Co. *v.* Clute, *supra*.

for the purpose of placing it in funds to meet the draft drawn upon it by Alcock & Co., and while it neglected and refused to pay the draft accepted by it, it had no cause of action against the plaintiffs upon the draft accepted by them. Its transfer thereof to Mrs. Leslie was a diversion thereof from the purpose for which it was accepted, and as she took it without parting with any value to apply upon a pre-existing indebtedness of the American Exchange to her, she stands in no better position than it, and can no more compel payment by the plaintiffs of the draft than it could if it had brought an action thereon. There can be no doubt, therefore, that upon the facts alleged in the complaint the plaintiffs have a perfect defense to the action brought against them by Mrs. Leslie.

Upon the facts alleged, there is no controversy between Alcock & Co. and Mrs. Leslie. They claim payment for the goods sold by them to the plaintiffs. Mrs. Leslie claims payment of the draft drawn by the American Exchange upon the plaintiffs and accepted by them. Alcock & Co., therefore, have nothing to litigate with her, and have no interest in her controversy with the plaintiffs. They are, in any event, upon the facts alleged, entitled to payment for the goods purchased of them by the plaintiffs, and no litigation between them and her could in any way affect their rights to such payment.

If Mrs. Leslie claims precisely what is alleged in the complaint her claim is good for nothing, and she cannot recover upon the draft against these plaintiffs. If, however, as may be inferred, she in fact claims that she is a *bona fide* holder of the draft for value, then she can recover thereon against the plaintiffs, and if they should be compelled to pay her the amount of the draft they would still be liable to pay Alcock & Co. the price of the goods.

It is true that Alcock & Co. and Mrs. Leslie both claim the same amount of the plaintiffs, but the one claims it for goods sold and the other claims it upon a draft, and if the plaintiffs should pay the money into court would it be paid to apply upon the price of the goods or upon the draft?

Undoubtedly the plaintiffs are exposed to the hazard of paying the sum claimed of them twice. But that hazard does not spring out of their liability to pay Alcock & Co., but out of the question whether Mrs. Leslie is a *bona fide* holder of the draft for value; and whether she is or not is a matter solely between them and her.

If the two defendants were both claiming the money due upon the draft, or both claiming the money due for the price of the goods, the case would be different. But one defendant claims payment for the goods and the other claims payment upon the draft, and payment of the one would be no defense to an action for the other.

We may imagine still another state of things. Suppose the plaintiffs claim and are able to establish that Alcock & Co. took the acceptance of the American Exchange in absolute payment for the goods sold to the plaintiffs. Then the only parties interested in that matter are the plaintiffs and Alcock & Co. Mrs. Leslie has no concern with it, and she and Alcock & Co. cannot be compelled to engage in a litigation over it. As has been stated, if she is a *bona fide* holder for value, her claim upon the draft cannot be defeated by showing payment for the goods. If she is not a *bona fide* holder for value, she cannot recover, as the sole purpose of the draft was to put the American Exchange in funds to pay the accepted draft of Alcock & Co., and it could not lawfully transfer this draft to her to apply upon a precedent debt.

For all these reasons, therefore, it is entirely clear that this is not a case for interpleader, and the judgment below should be affirmed, with costs.

All concur, RUGER, Ch. J., in result.

Judgment affirmed.



STEVENSON v. ANDERSON.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 21 AND APRIL
7, 1814.

[Reported in 2 Vesey & Beames 407.]

THE bill stated, that the defendant Anderson, on the 13th of September, 1812, ordered goods from James and John Goodall, his correspondents in Scotland ; and, to indemnify them, remitted four bills of exchange, amounting to £166 16s. 5d. accepted by different persons, and indorsed by Anderson.

Thomas Dick, of Dundee, in Scotland, claiming as a creditor of Anderson, having instituted proceedings against him for that debt before the Lords of Session in Scotland, served the Goodalls with letters of arrestment upon any property of Anderson in their hands, to the amount of £150 sterling, and attached the bills of exchange in their hands, Anderson wrote to the Goodalls, desiring to have the bills returned to him ; and having also demanded them from the plaintiff, to whom they had been sent for the purpose of procuring payment, on his refusing to deliver them up, commenced an action of trover.

The bill prayed, that Anderson, and the Goodalls and Dick, who were out of the jurisdiction, should interplead as to the said bills of exchange, and an injunction.

The defendant Anderson, having put in a demurrer for want of

equity, that demurrer came on with a motion to discharge the Vice-Chancellor's order granting an injunction on bringing the bills into court.

Mr. Hart and Mr. Cooke for the plaintiff.

It is not necessary, in order to sustain a bill of interpleader, that actions should be commenced: it is sufficient that contradictory claims are set up.¹ This, which is also the case of a mere agent, has the peculiarity, that two of the defendants reside out of the jurisdiction: but that circumstance affords no distinction; as according to *Bourke v. Lord Macdonald*,² followed by *Scott v. Hough*,³ the process of this court may be served in Scotland. It is true, Mr. Erskine, in his Institutes, says, that bills of exchange are not attachable by the laws of Scotland: but Mr. Bell shows, that this is not to be received absolutely; that bills may be attached in the hands of a person, intrusted, as the Goodalls were. Admitting, however, that to be questionable, the plaintiff should not be put to the difficulty of agitating that question; especially as a judgment in Anderson's action of trover would be no answer to an action brought by the Goodalls against the plaintiff in respect of these bills.

Sir Samuel Romilly and Mr. Trower in support of the demurrer.

This bill of interpleader is of the first impression; by a person having no money in his hands, but holding these bills as an agent to procure payment: instead of which he files this bill; hazarding by the delay the loss of their amount.

Another novelty in this case is, that the persons, with whom Anderson is called upon to interplead, are not within the jurisdiction; which was held a fatal objection by your Lordship in a late case: some of the defendants residing at Hamburg. This, under the pretence of interpleader, is really a bill against Anderson alone; and the object, to compel him to involve himself in a litigation in Scotland.

This, in truth, is the suit of the Goodalls; and the court has a right to the security of their affidavit, that they do not collude with the plaintiff, to whom they have handed over these bills.

The LORD CHANCELLOR observed, upon the form of the affidavit, attending a bill of interpleader, in Harrison's Practice, that it seemed to go too far in stating, that the bill was filed without the "knowledge" of either of the defendants. His Lordship further observed, that he should be sorry to say, a bill of interpleader could in no instance be maintained, where one defendant only was within the jurisdiction; recollecting, though unable at the moment to refer to instances, that such bills had been sustained for a reasonable time; and the plaintiff,

¹ *Langston v. Boylston*, 2 Ves. jun. 101.

² 2 Dick. 587.

³ 4 Bro. C. C. 213.

having used due diligence to procure appearance, obtained relief by injunction ; the residence of two defendants out of the jurisdiction was not therefore a conclusive answer to the bill.

THE LORD CHANCELLOR. I have looked at this record with great care, and every case I can find of interpleader : and, though I doubt, whether there is perfect *bona fides* on the part of the plaintiff, I find it decided that the court is in the first instance concluded by his affidavit, that there is no collusion ; and will not admit an affidavit to the contrary.

Upon the next consideration, whether the plaintiff has stated a right to come here as to these bills, for which it is said he would be answerable to his principals, residing in Scotland, it is very difficult to maintain, that he would not be answerable to them in an action, if they revoked the purpose for which he was employed ; but there is enough to make them parties to a bill of interpleader. Next, if Anderson could maintain his action of trover for these bills, and there is great resemblance that he might, that makes a double claim ; which, according to some authorities, is sufficient. There is also an attachment in Scotland ; which, from Bell's last publication, is a circumstance raising considerable doubt, whether bills under such circumstances are not attachable, notwithstanding what is said in Erskine's Institute : but, supposing, that attaching creditor was not a party, still there are divers claims ; as there are two other parties. The bill is therefore capable of being supported.

It was objected, that the Goodalls and the attaching creditor are out of the jurisdiction ; and, as there is only one creditor within the jurisdiction, a bill of interpleader cannot be filed. Upon the authorities, that proposition cannot be maintained ; as a person, out of the jurisdiction, may threaten, and bring, an action ; and, though he should never come within the jurisdiction, there is a familiar mode of concluding him. The plaintiff is bound to bring all persons into the field to contend together. That rests upon him. I have had occasion to consider that with reference to persons, not residing in Scotland, but foreigners ; and the opinion I formed upon it, without any difficulty, or the aid of a precedent, which I could not find, though there is precedent enough of willing defendants, is, that the plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction in a reasonable time ; if he does not, the consequence is, that the only person within the jurisdiction must have that which is represented to be the subject of competition ; and the plaintiff must be indemnified against those who are out of the jurisdiction, when they think proper to come within it, and sue either at law or in this court. If the plaintiff can show, that

he has used all due diligence to bring persons, out of the jurisdiction, to contend with those who are within it, and they will not come, the court, upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterward came here and brought an action, order service on their attorney to be good service, and enjoin that action forever; not permitting those, who refused the plaintiff that justice, to commit that injustice against him.

This motion, therefore, must be granted; and the demurrer overruled: but the plaintiff must use prompt diligence to get them within the jurisdiction: if he does not, I shall dissolve the injunction.

It was agreed, that the money due upon the bills should be received, and paid into court by the plaintiff.

SIR CHARLES MORGAN AND OTHERS (TRUSTEES OF THE EQUITABLE INSURANCE COMPANY), PLAINTIFFS, *v.* CHARLES MARSACK, AND SIR FRANCIS BOYNTON, BART., DEFENDANTS.

IN CHANCERY, BEFORE LORD ELDON, DECEMBER 17, 1816.

[*Reported in 2 Merivale 107.*]

THE bill stated that in February, 1788, John George Parkhurst, and Mary his wife (formerly dame Mary Boynton, widow of Sir Griffith Boynton, Bart.), in consideration of £2,200, granted to the defendant Marsack, an annuity during the life of the wife. That on the 20th of the same month a policy of insurance for the said sum of £2,200, was granted to the defendant Marsack, by the Equitable Insurance Company, upon the life of the said Mary Parkhurst. That by indentures of lease and release dated the 23d and 24th of December, 1793, between Parkhurst and his wife of the first part, the defendant Marsack and two others (as trustees appointed by or on the part of the said Mary Parkhurst, and of the several other annuitant creditors of the said Parkhurst and wife), of the second part; and the said several other annuitant creditors of the third part; reciting that considerable arrears were due on the several annuities, and that the annuitants had agreed to accept the respective sums therein mentioned, to be charged and secured as also therein mentioned, in lieu of their annuities; the said Mary Parkhurst appointed, and the said Parkhurst and wife granted and confirmed, to the said trustees and their heirs, certain hereditaments which had been allotted to the wife for dower, upon trust to retain and pay to the several annuitants,

parties thereto, their executors, etc., in the first place, interest at £5 per cent. upon the principal sums so agreed to be accepted by them, and in the next place the several annual sums therein mentioned for insurance on the said principal sums; with a power for the said Mary Parkhurst at any time during her life to pay off and discharge the whole or any part of such principal sums.

In June, 1815, Mary Parkhurst died, having appointed her son (the other defendant) her executor. Shortly after her death, the defendant Marsack received from the Royal Exchange Assurance office £1,400, the amount of an insurance made by him with that office, for a part of the principal sum of £3,614, accepted by him under the trust deed; and there was then due to him from the Equitable Assurance Company upon the policy so granted to him as aforesaid, according to the rules of the office, the sum of £5,216, which the bill charged that the plaintiffs, as trustees of the company, were ready to pay to such person or persons as should be entitled thereto, but that the defendant Marsack insisting that he was entitled to the whole sum, and Boynton on the contrary insisting that Marsack was entitled only to the extent of the £3,614, and that he the defendant Boynton ought to be paid and received the remainder as executor of Mary Parkhurst, the said defendants threatened to bring actions against the plaintiffs upon their respective claims, and the plaintiffs were unable to ascertain to which of them the said sum of £5,216 or any part thereof (except the £3,614) belonged; therefore praying that they might interplead and settle their rights to the said sum; the plaintiffs being ready and willing to pay the same to such of the parties as should appear to be entitled, and in the meantime to pay the same into court; that, upon paying the same into court, the defendant Marsack might deliver up his policy of insurance; and for an injunction against both the defendants from commencing any proceeding at law in respect of the sum so due as aforesaid.

The plaintiffs now moved, upon affidavit, that they might be at liberty to pay the money into court, and for an injunction, and delivery of the policy of insurance, as prayed by the bill.

The motion was supported on the part of the defendant Boynton, but opposed by the other defendant, upon the ground that this was not a proper case of interpleader, both as the plaintiffs had not been actually sued, and as only one of the defendants had a legal right to sue, or was capable of maintaining an action.

In reply, it was insisted that the principle upon which the bill of interpleader is founded, is to prevent a plaintiff from being doubly harassed by opposite claims; and that an action at law and a suit in equity were not less a double vexation, than two actions at law. The

following cases were cited : *Dungey v. Angove*,¹ *Angell v. Hadden*,² *Slingsby v. Boulton*.³

Leach and *Spranger* for the plaintiffs.

Sir S. Romilly and *Wingfield* for the defendant Boynton.

Hart and *Barber* for the defendant Marsack.

The LORD CHANCELLOR. It is necessary to a bill of interpleader, that the plaintiff should admit a right in each party to sue him ; and that right is admitted by the present plaintiff. There are many cases in which bills of interpleader have been entertained, where the demand of one defendant was by virtue of an alleged legal, and of the other, of an alleged equitable right. That circumstance, therefore, constitutes no objection to the application.

In this case a bill had been filed by the defendant Sir Francis Boynton, against the other defendant, for an injunction to restrain him from proceeding at law to recover the £5,216 ; and an injunction had been granted, which was afterward dissolved upon the merits. It was contended that the fate of this injunction had actually determined the rights of the parties, and consequently that there was no ground for interpleader. But the Lord Chancellor overruled this objection also.

It being admitted, however, that there was no question as to the defendant Marsack's right to £2,200, part of the sum in question, the order made was for payment of the £2,200 to the last-mentioned defendant; and that the plaintiffs should pay £3,016 (the residue of the £5,216) into court, to be laid out and accumulate, subject to further order. Upon such payment being made, that the defendant be restrained from proceeding at law against the plaintiffs, and in case the plaintiffs should not proceed to compel the defendant Boynton to answer their bill, the other defendant was to be at liberty to apply to the court as he should be advised.

WARINGTON v. WHEATSTONE.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 11 AND AUGUST
7, 1821.

[Reported in *Jacob* 202.]

IN the year 1807 Anthony Henderson effected an insurance at the office of the Albion Fire and Life Insurance Company, for the sum of £3,000, upon the life of Samuel Henderson. S. Henderson died in February, 1821, upon which the £3,000 was claimed by Sir F. G.

¹ 2 Ves. jun. 312.

² 15 Ves. 244; 16 Ves. 202.

³ 1 Ves. & B. 334.

Fowke and Mary Ann his wife, the latter being the personal representative of Anthony Henderson, who had previously died. Another claim to the £3,000 was also made by John Wheatstone, the personal representative of Samuel Henderson. He alleged that the insurance had been effected as a collateral security to Anthony Henderson, with a mortgage made to him by Samuel, and that the mortgage had been paid off by Samuel in his lifetime, by which means he had become entitled to the benefit of the policy. Samuel Henderson had in 1818 filed a bill against Sir F. G. Fowke and his wife, representing that he had discharged the mortgage, and praying an account and a reconveyance, and an assignment of the policy; the answers were put in, but no further proceedings had been had in the cause.

Wheatstone, on the 28th of February, 1821, served the Albion Company with a notice of his claim, demanding payment of the £3,000. On the 7th of May he filed a bill against Sir F. G. Fowke and his wife, and D. R. Warington, and W. Rayley, the plaintiffs in this cause, who were the surviving directors of the Albion Company, who had signed the policy in question, praying that he might be declared entitled to receive the £3,000; and an injunction to restrain Warington and Rayley from paying it to Sir F. G. Fowke and his wife, and to restrain the latter from commencing any proceedings at law for the recovery of it.

Sir F. G. Fowke and his wife as of Easter term, commenced an action for the £3,000 due upon the policy, against Warington and Rayley, upon which they, on the 5th of June, filed a bill of interpleader against Wheatstone and Sir F. G. Fowke and his wife, and after the time for answering had elapsed, they moved before the Vice-Chancellor for liberty to pay the £3,000 into court, and for an injunction against the defendants. The motion having been refused by his Honor, was now renewed before the Lord Chancellor.

Mr. Hart and Mr. E. R. Daniell in support of the motion.

Mr. Heald, Mr. Ching, and Mr. Purvis on the other side.

The objection to the present suit is, that it is quite unnecessary, as every object that can be desired from it may be obtained in the other suit of Wheatstone *v.* Warington, in which the parties are the same as in this. The Vice-Chancellor considered that Warington and Rayley might have moved in that suit for the injunction, that is now their object. But whether they could or could not, that suit furnished a complete indemnity to them; for the plaintiff in that suit may move for them to pay the money into court, and to restrain Fowke and his wife from proceeding in their action; if he neglects to do so, and they, in consequence, pay the money to Fowke, the plaintiff could not complain of the consequence of his own laches.

The LORD CHANCELLOR. The injunction on an interpleading bill does not, like the common injunction, leave the plaintiff at law at liberty to demand a plea, and proceed to judgment, but it stays all proceedings. The plaintiff in an interpleading bill admits that he has no defense, and makes an affidavit that he does not collude with either party ; the protection that he has is, that he is relieved from their proceedings against him, whether at law or in equity, as soon as his diligence enables the court to do so. The question here seems to be, whether that protection is to be taken away, because the plaintiff in some other suit may make a motion for payment of the money into court. If a party gives notice of his claim to the money by filing a bill, and it is afterward paid away pending the suit, I do not know that his not having moved for it to be paid in would be any protection.

It is important certainly to consider these points, for I understand that an opinion is afloat that on an interpleading bill the injunction cannot be moved for till the time for answering is out. I always thought that it was not so, but that the injunction might be moved for at once; indeed there are some cases where the injunction would be quite useless, unless it could be obtained immediately. Some mistake I believe arose in a communication that I had on this point with the Vice-Chancellor through Mr. Crofts. I think I then mentioned to him the case of the plaintiff, not knowing that a bill would be necessary, from not having notice of the demand of one party, till the other had obtained judgment, and was about to take out execution.

Here the question is, whether the plaintiffs can have the same protection in another person's suit that they can have in their own. If you do not let them have the carriage of the cause, and the plaintiff in the other does not move for them to pay the money in, I question whether his not doing so would be an answer to him at the hearing, for the pendency of the suit is notice of his demand. If the plaintiffs in this cause could make this motion in the other cause, it must be supported by an affidavit of there being no collusion, otherwise they could not be allowed the same advantages that they would have upon a bill of interpleader ; but I do not remember any instance of such a motion.

Aug. 7.—The LORD CHANCELLOR made the order for the injunction on payment of the money into court.

MOSES YARBOROUGH v. CASWELL C. THOMPSON.

IN THE HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI,
NOVEMBER TERM, 1844.

[*Reported in 11 Mississippi Reports 291.*]

APPEAL from the Circuit Court of Choctaw County.

The case is fully stated in the arguments of counsel and the opinion of the court.

Gray for appellant.

William G. Thompson for appellee.

Mr. Justice CLAYTON delivered the opinion of the court.

The single point presented in the argument of this cause is, whether the bill discloses a case in which a bill of interpleader can be sustained.

The complainant Thompson was indebted to one James Holbert by promissory note, who assigned it to Yarborough, the present appellant. Holbert was indebted to Loftus & Smith, who issued a garnishment against Thompson. At the time of the service of the garnishment, Thompson had no notice of the assignment, but received notice before he filed his answer. Under the advice of counsel, as the bill alleges, the complainant filed such an answer to the garnishment, that judgment was rendered against him upon it for the amount of the note. Suit was subsequently brought by Yarborough, the assignee upon the note, who likewise recovered judgment upon it. The complainant then filed this bill of interpleader against the judgment-creditors respectively, requiring them to interplead, and praying that one or the other might be perpetually enjoined.

A bill of interpleader is a proper remedy when suits are either threatened, or actually pending by two different claimants against a party, claiming the same debt or duty by different or separate interests. The complainant not knowing to which of right he ought to pay or render it, files a bill and requires them to interplead, that the court may determine the right.¹ The principle of a bill of interpleader is to protect the party, not only from being compelled to pay, but also from the vexation attending the discussion of all the suits that may be instituted.² It is not necessary in order to justify the filing of such a bill, that suit should actually have been commenced; it is sufficient that claim should have been made against the party, and that he is in danger of being molested by conflicting rights.³

But after judgment at law, and after the right is thus determined,

¹ Cooper's Equity Pl. 46, 2 Story's Equity, 112 *et seq.*

² 15 Ves. 246.

³ 2 Story's Equity 116.

a court of equity cannot interfere upon the footing of a bill of interpleader. The complainant might have made his defense at law, or at all events, should have filed his bill before judgment; because of the familiar rule, that a court of equity cannot give relief when the party might have made defense at law.

There is no evidence that anything unconscientious was done by either of the defendants in this case, in obtaining their judgments. Each proceeded upon a legal claim. The complainant defended each, but from some cause was unsuccessful in both. One of the judgments is no doubt wrong; but, from the bill, the error was induced by the complainant's answer to the garnishment. A court of equity has no power to correct the errors in judgment of a court of law; that belongs to the appellate tribunal. Neither can it compel one party to relinquish a judgment at law, because his adversary did not comprehend his rights, or was mistaken in a matter of law. The case is a hard one, but the complainant has no right to complain of either of the defendants, or of the court. The judgments of the courts of law, upon the facts before them, were right in each instance. If a case of fraud or surprise in obtaining either of the judgments were made out against either of the parties, that might entitle the complainant to relief against such party; but that would be done upon an original bill, not a bill of interpleader.¹

This conclusion is reached in full view of what is said by the court in *Oldham v. Ledbetter*.² The remark in that case, that the plaintiff could have protected himself by bill of interpleader, was thrown out without sufficient consideration. It was not a point for decision. The cases there cited only prove that a judgment against a garnishee upon an attachment, after an assignment of his note, will not form a bar in his favor, in an action by the assignee.

If, in such case, the garnishee answer with the requisite caution, he will run no risk. If he state the fact, that he executed a note to the debtor of the attaching creditor, but he does not know who holds it, or whether it be assigned or not,—still more, if he state that it has been assigned, and that he has received notice of it, no judgment upon the attachment can be rendered against him.³ Of course he must answer according to the fact. But if he neglect so obvious a precaution, he is but in the situation of every other defendant, who neglects his proper defense at law, at the time he has the means of making it.

The decree of the court below will be reversed, and the bill dismissed.

¹ 2 Robinson's Prac. 214.

² 1 How. 47.

³ See *Huff v. Mills*, 7 Yer. 45.

HAMILTON v. MARKS.

IN THE HIGH COURT OF CHANCERY, BEFORE SIR JAMES PARKER,
V.C., JUNE 24, 1852; BEFORE SIR JOHN STUART, V.C., MAY
5, 1853.

[*Reported in 5 De Gex & Smale's Reports 638.*]

THE Sun Fire Insurance Company, by a policy dated on the 5th of September, 1848, agreed with Robert Marks that the funds of the company should be liable to pay to him the damage and loss which he might suffer by fire in respect of his dwelling house, auction room, and offices, and household goods, fixtures, wearing apparel, printed books, and plate therein, fixtures, and goods in trust in trade therein, not exceeding for the dwelling house, auction room, and offices £1,200, and for the other particulars the further sum of £2,000. A fire broke out on the 11th of November following the date of the policy on the premises insured, and Mr. Marks claimed from the company under the policy £2,374 16s. for compensation for damages sustained; and he brought an action in the Court of Exchequer in January, 1849, against Mr. Hamilton, the treasurer of the company, to recover the amount; and a verdict was found for the plaintiff, with £700 damages in respect of the furniture, with liberty to move to increase the damages by a sum not exceeding £1,200 in respect of injury to the building. Upon a rule to show cause why the damages should not be increased accordingly, argued on the 16th of April, 1852, it was ordered by the court that Mr. Hamilton should pay within a week the £700 damages, and £150 toward the costs of the cause; and it was referred to the Hon. George Denman to ascertain what, if any, sum should be added to the damages in respect of the building.

In the year 1848, Mr. Marks had taken the benefit of the acts for the relief of insolvent debtors, and all debts due or growing due to him became vested in Mr. Sturgis, as the provisional assignee of the court. In April, 1848, Mr. Marks was discharged from custody; but by an order of the Insolvent Debtors Court of the 30th of March, 1849, the order for his discharge was, upon a rehearing, annulled, and he was remanded to prison for twelve months.

Mr. Bartholomew, having been appointed the creditors' assignee of the estate of Mr. Marks, gave notice to the Sun Fire Office in December, 1848, of his appointment, and desired the office not to pay to Mr. Marks the moneys recoverable under the policy.

Notices of several other claims to and liens on the moneys recoverable from the office were served on the Sun Fire Office by the other defendants. The plaintiff, as the treasurer and officer authorized by

the private Act of Parliament to sue and be sued for the Sun Fire Office, on the 22d of April, 1852, filed his bill of interpleader against Mr. Marks and the other claimants, offering to pay the £700 into court, and any further sum which, under the reference to Mr. Denman, might be awarded against the company, for the benefit of such of the persons claiming the fund as might be entitled thereto. The bill prayed for an injunction restraining Mr. Marks and the other defendants from taking or permitting any proceedings against the plaintiff or any other member of the Sun Fire Company under, or for enforcing, the judgment of the court of common law, or the order of the 16th of April, 1852, so far as related to the £700 damages by that order directed to be paid within a week.

The bill being supported by the affidavit of the plaintiff denying collusion by him, this court, on the 23d of April, 1852, upon the *ex parte* application of the plaintiff, ordered the plaintiff, on the 24th of April, 1852, to pay into court to the credit of this cause £700, the plaintiff undertaking to pay any further sum which might be awarded by Mr. Denman under the reference to him; and the usual injunction in an interpleader suit was granted to restrain proceedings at law.

Mr. Marks, in June, 1852, put in his answer to the bill, stating that he had been insured for about twelve years immediately next preceding the time of the fire, in an office to whose business the Sun Fire Office Company succeeded, and in that office, with the exception of a few months previously to the date of the policy in question in the cause; that, after the verdict at law, Mr. Hamilton moved the Court of Exchequer to set aside the verdict and for a new trial, on the ground of Mr. Marks' insolvency and notices of adverse claims to the money recovered, and that the amount recovered was vested in Mr. Sturgis; and that, if the company should pay the amount for which the verdict was given to Mr. Marks, they would have to pay the same over again to the other claimants; but that the court, after taking time to consider the question, refused the application, on the ground that Mr. Sturgis had no claim, and that payment to Mr. Marks would be an effectual discharge to the company. Mr. Marks also stated, that the appointment of the defendant Bartholomew as an assignee in his insolvency had never been perfected; and he alleged that Bartholomew's notice had been given at the instigation of an officer of the company. He alleged that the policy in question was effected after his insolvency; that Mr. Sturgis disclaimed all interest in the policy; and he denied it to be true, that Mr. Sturgis claimed any interest in the moneys in question. As to one other claim, he denied that he had created it; and as to the remaining claim by memorandum, he alleged that he had signed it incautiously, and without having read

it, and that its statements were incorrect; and he denied that any lien upon the amount recovered in the action, except the lien of his attorney for costs in the action, was effective.

Mr. Russell, Mr. Flather, and Mr. W. J. Metcalfe now moved, upon the answer of Mr. Marks, to discharge the injunction restraining his proceedings at law upon his verdict. The plaintiff alone is served with notice of this motion: it is not necessary to serve the other defendants. The case of the plaintiff, as it stands on his own bill, is not one of interpleader. The claim of Mr. Marks was one at law, for which his receipt would effectually discharge the plaintiff, and no other person can sue the plaintiff at law. The claims of any of the persons who are stated to claim can be only sustained at law in the name of and through Marks. If, however, these claims raised a case of interpleader, the plaintiff has come too late to this court for relief. Here the plaintiff has contested the defendant's right at law, not merely up to the verdict, but by a rule subsequently obtained, on which the only substantial adverse claim, that of Mr. Sturgis, was brought before the court of common law, and, after deliberation, the objection was disallowed. A bill of interpleader ought to be filed before, or at least immediately after, the actual commencement of proceedings at law; and the bill will be too late if it be not filed until after a judgment, or even after a verdict has been obtained in an action at law. It is oppressive that a defendant at law should be allowed to try his chance of succeeding at law, and if he fail there, then that he should harass the plaintiff at law by coming into this court. It is on this principle, that, where a bill of interpleader was filed after a verdict had been obtained by one of the defendants, and an injunction was granted on the money being paid into court, the court, on the motion of a defendant who had filed his answer, dissolved the injunction, although the other defendants had not filed their answers, the plaintiff not having satisfactorily accounted for his delay in filing the bill.¹ There is no evidence in support of the plaintiff's case; and the collusion by the plaintiff's officer, stated by the defendant's answer, stands uncontradicted.

[The VICE-CHANCELLOR. The practice of the court does not require an affidavit of merits to retain the injunction]

But the original affidavit on which the injunction was obtained was not sufficient; it was confined to a denial of collusion by the plaintiff himself, he being only an officer of the company, and it did not deny collusion by the company.²

Mr. Wiggram and Mr. Pole for the plaintiff. This motion is improperly made in the absence of the other defendants. Where an in-

¹ *Cornish v. Tanner*, 1 Y. & J. 333.

² *Bignold v. Audlard*, 11 Sim. 23.

junction has been granted in an interpleader suit, all the defendants are interested in it, and all ought to be served with notice of motion to dissolve it.¹ This was also the rule as laid down in *Langston v. Boylston*.² The plaintiff is not bound to investigate the title of the different defendants; and it is impossible for the court to determine them in the absence of the other defendants. The bill was filed as soon as the plaintiff could possibly ascertain that it was necessary for his protection to come to this court. The decision of the court at law having occurred on the 5th of April, the bill was filed on the 22d of that month.

Mr. Russell in reply. The plaintiff here has denied his own liability, and this disentitles him to come to this court in the character of a stakeholder, for whose benefit only the kind of relief upon an interpleader suit is intended. Mr. Sturgis' title was disposed of by the court of law, and he makes no claim. All the other claims set up by the plaintiff are merely equitable, and limited to an amount that does not exhaust the whole fund. All the defendants claim under Marks' action; and payment under that action would be a complete discharge to the present plaintiff.

The VICE-CHANCELLOR. Upon this motion the court can decide nothing as to the title of the absent defendants. As to the £700, the circumstances clearly raise a case of interpleader; the plaintiff having paid the money into court, and having made an affidavit that there is no collusion, has entitled himself to the injunction he has obtained. But it is said, that the plaintiff cannot file a bill after the demand has been contested by him, and has been decided against him at law. The case of *Cornish v. Tanner* has been referred to in support of such a rule; but the present case differs from that. Here the dispute at law was confined to the quantum of demand, which could only be settled at law; and there is no rule of this court to preclude a defendant at law who has done that, from obtaining relief in an interpleader suit. Then, it is said, that there was collusion. It is true the affidavit of the plaintiff that there is no collusion, is not in the proper form. But this is not the proper time for taking that objection; it should be made on a demurrer, and then leave to amend the affidavit might be given. As to the costs, the real question in this case is, whether the plaintiff was entitled to call on the defendants to interplead or not; and the costs of this motion must be costs in the cause.

May 5, 1853.—The answers of all the defendants having been put in, Mr. Marks again moved that the injunction might be dissolved. This motion and the hearing of the cause were brought before the court at the

¹ *Masterman v. Lewin*, 2 Ph. 182.

² 2 Ves. jun. 101.

same time. The only substantial difference in the circumstances of the case upon the present motion was, that, upon this motion, all the defendants were before the court; and that the plaintiff, on amending his bill, subsequent to the hearing of the former motion, to bring a fresh defendant before the court, filed a fresh affidavit, sworn on the 21st of November, 1852, by which he denied collusion by himself absolutely, and, to the best of his knowledge and belief, by the company.

The arguments upon this motion were much the same as on the first motion.

The VICE-CHANCELLOR (Sir JOHN STUART) said, that this was as clear a case of interpleader as he had ever seen; and he refused the motion, with costs, to be paid by the defendant Marks to all parties.

Upon the hearing of the cause, the common interpleader decree was made; but it has not yet been drawn up.

LARABRIE *v.* BROWN.

IN THE COURT OF APPEAL, MAY 4, 1857.

[Reported in 26 *Law Journal Reports, Equity, New Series* 605.]

THIS was a renewal of a motion for an injunction to restrain the defendants from issuing execution on a judgment and from taking out of the Court of Queen's Bench a sum of money paid in by the plaintiffs.

The suit was an interpleader suit, leave to file the bill in which had been granted by the Full Court of Appeal.¹

The circumstances were as follows :

The plaintiffs, Messrs. Larabrie & Eaton, carry on business as coal-merchants at Nantes, in France, and Messrs. Brown & Marr carry on the same business in London. In July, 1856, the plaintiffs entered into an agreement with Messrs. Lazarus Simon Magnus & Co., general merchants in London, for the supply of a large quantity of coal which the firm of Magnus & Co. contracted with Messrs. Brown & Marr to supply, and which they duly delivered to Messrs. Larabrie & Eaton. The firm of Brown & Marr applied to the plaintiffs for payment of £568, the value of the coal delivered, but they refused to pay this demand, alleging that they were responsible to Messrs. Magnus & Co., with whom they had contracted, and that they were under no agreement with Brown & Marr. Brown & Marr upon this refusal commenced an action against Larabrie & Eaton to recover the value of the coal, and on the 20th of December, 1856, the present plaintiff Larabrie, who was in England, was arrested at their suit. He was bailed by a member of the house of Magnus & Co., and immediately de-

¹ 26 L. J. R. Eq. N. S. 416.

parted for Nantes, where he resided, in order, as he stated in his affidavit, to prevent any report as to his arrest from getting into circulation there calculated to do him injury. He also stated that he left England in such haste that he neglected to advise with his solicitors as to the defense to the action, and they in consequence were wholly without instructions. In January, 1857, the plaintiffs at law, Brown & Marr, delivered the particulars of their demand to the solicitors of Larabrie & Eaton, and the action came on to be tried on the 13th of February, 1857, when the solicitors for the defendants at law, believing that there was no defense to the action, allowed a verdict to be taken by default for the sum of £568, the whole amount claimed. The present plaintiffs, by their bill and affidavits, alleged that from the time of the return of Mr. Larabrie to Nantes until after the action was tried, they were both residing abroad, and further, that Lazarus Simon Magnus, who was the principal partner in the firm of Magnus & Co., the person with whom the original contract had been entered into by the plaintiffs, and who was alone in a position to give a correct account of the transactions, was, for some weeks previously to the trial and at the time when it took place, also abroad. Upon his return soon after the trial, the attorney of the present plaintiffs discovered from him that the contract entered into by Larabrie & Eaton was with his own house of Magnus & Co., and not with Messrs. Brown & Marr, and that the last-mentioned firm had delivered the coals to the order of Magnus & Co., and he forthwith applied for a stay of execution upon the verdict to Mr. Justice Erle, who made an order staying execution on Larabrie & Eaton paying into court the amount for which the verdict had been found, and they accordingly paid into court £568, and on the 16th of April a rule *nisi* for a new trial was moved for by the present plaintiffs in the Court of Queen's Bench, but it was refused. Thereupon the plaintiffs, having obtained leave, filed, on the 23d of April, the present bill against Messrs. Brown & Marr and Messrs. Magnus & Co., praying that the defendants might interplead, the plaintiffs being willing to pay the money to such of the defendants as should appear rightfully entitled to receive it, and that the defendants Brown & Marr might be restrained by injunction from proceeding to execution in the action at law, and also from taking out of court the sum paid in by the plaintiffs.

Upon a motion for an injunction before the Master of the Rolls, his Honor refused to make the order, and the present appeal was a renewal of the motion.

Mr. A. H. Louis, for the appellants, argued that if it could be shown that there was sufficient explanation of delay there was no reason in principle why the defendants should not interplead. It was proved

beyond controversy here, that the permitting the verdict to pass, was by mistake occasioned by the hurry of Mr. Larabrie's departure after his relief from arrest ; and the absence of an important witness abroad, namely, Mr. Magnus, hindered an earlier application to a common-law court. That the plaintiffs in the suit were still liable to be sued by Magnus & Co. was a good ground for interference, and such was plain from the case of *Paterson v. Gandasequi*,¹ in which case it was said by Lord Ellenborough : "The court have not the least doubt that if it distinctly appeared that the defendant was the person from whose use and on whose account the goods were bought, and the plaintiff knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action " And again, "The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him ; but that must be taken with some qualification, and a party may preclude himself from recovering even against the principal, by knowingly making the agent his debtor." Mr. Justice Bayley added, "I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot, therefore, afterward charge the principal."

Mr. Roundell Palmer for Magnus & Co., and

Mr. Selwyn and *Mr. Terrell* for Brown & Marr, were not called upon.

LORD JUSTICE KNIGHT BRUCE said that the writ in the action at law had been served, and the defendant Larabrie had been arrested in the month of December last. The declaration had been delivered early in January, and the particulars of the plaintiffs' demand on the 20th of that month. The cause was tried (and it was for the present purpose immaterial whether it was tried as a defended or an undefended cause) on the 13th of February, and then, after an ineffectual attempt to obtain a rule *nisi* for a new trial, this present bill, which was now called an interpleader bill, was filed by the defendants. The length of time which had been allowed to elapse was in itself fatal to an application of this nature. The motion must be refused, with costs.

LORD JUSTICE TURNER said that he agreed in that opinion. This application was substantially a bill for a new trial ; and although such bills appeared to have been allowed in former times, his Lordship be-

¹ 15 East 62.

lieved that no similar attempt had been made for the last two or three centuries. The simple question had been, whether Messrs. Larabrie & Eaton were or were not debtors at law to Messrs. Brown & Marr, and a court of law had decided that they were. He agreed that this appeal motion must be refused, with costs.

PRUDENTIAL ASSURANCE COMPANY *v.* THOMAS.

IN THE COURT OF APPEAL IN CHANCERY, NOVEMBER 21, 1867.

[Reported in *Law Reports*, 3 Chancery Appeals, 74.]

THIS was a motion in an interpleader suit.

James Black, in 1863, insured his life for £200 in the Consolidated Assurance Company, which was afterward merged in the Prudential Assurance Company.

By an indenture, dated the 16th of June, 1863, James Black purported to assign the policy, and all moneys payable thereon, to F. R. Thomas, and notice of this assignment was given to the company. James Black died in May, 1867, and Thomas claimed the £200 from the company ; but before the money was payable, the company received notice from Johanna Black, widow and executrix of James Black, not to pay the money to Thomas, as she disputed the validity of the assignment. Some interviews and some correspondence took place between the secretary of the company and Thomas's solicitor, and Thomas alleged that the secretary promised to pay the money secured by the policy to him, which the company denied.

The money secured by the policy was payable on the 29th of July, 1867, on which day there was an interview between Thomas's solicitor and the secretary, at which Thomas's solicitor agreed to send the solicitor of the company a copy of the deed ; but on the 1st of August, 1867, without any further communication, Thomas filed a bill against the company alone, asking payment of the money, and on the 9th of August the company filed this bill against Thomas and Johanna Black, stating shortly the facts above stated, but only mentioning the last interview between the secretary and Thomas's solicitor, and praying for liberty to pay the £200 into court, and that the defendants might be directed to interplead and settle their rights to the £200, and that the proceedings in Thomas's suit might be stayed, and that each of the defendants might be restrained from any other proceeding against the plaintiffs in respect of the £200.

On the 12th of August the Vice-Chancellor, Malins, granted an *ex parte* injunction restraining Thomas from proceeding in the suit, and

it was stated at the bar, and appeared from the judgment of his Honor, that the papers had been sent to him in the vacation, and that he had granted the injunction without hearing counsel. Thomas, on the 14th of November, moved to dissolve the injunction, and the Vice-Chancellor, Malins, dissolved it accordingly, saying that the company had dealt with Thomas in a manner which amounted to a contract to pay him ; that the company might have proposed to Thomas to make Mrs. Black a party, and have the question settled in that suit, instead of filing this bill, and that if the circumstances had been stated in the bill his Honor would not have granted the injunction.

The company appealed.

Mr. Osborne, Q.C., and *Mr. Phear* for the company.

We had no other course than to file this bill, as Thomas had not chosen to make Mrs. Black party to his suit. She is still, at law, the hand to receive the money.¹ We were quite willing to pay Thomas if we could safely do so ; but we never agreed to do so. In *Diplock v. Hammond*,² the other claimant was made party to the first suit. The object of interpleading is to prevent the innocent holder of money from being vexed by two suits. What is there in Thomas's suit to prevent Mrs. Black from filing her bill? In *Warington v. Wheatstone*,³ an injunction was granted to restrain a suit in equity, to which all were parties, and that is much stronger. So in *Sieveking v. Behrens*.⁴ We cannot safely pay the money into court in Thomas's suit.

Mr. Glasse, Q.C., and *Mr. Terrell* for Thomas.

You cannot institute a suit to restrain the proceedings in another. If the company in Thomas's suit stated that Mrs. Black made a claim, then Thomas would be obliged to make her a party, and if not, the order of the court for payment of the money would be a protection to the company. The company should have given notice to Thomas that his suit was imperfect. Instead of avoiding multiplicity of suits, here is a multiplicity. One suit in equity cannot be restrained by another, as the defendant in equity may make his case out as well as if he was plaintiff. The motion ought to be entitled in both suits.

Mr. Crossley for Mrs. Black.

Mr. Osborne in reply.

SIR JOHN ROLT, L.J., stated the facts of the case, and said that, in his opinion, the dealings between the company and Thomas did not amount to a contract by the company to pay Thomas, and that the interpleader bill was properly framed, and did not conceal or misrepresent the case. His Lordship continued :

¹ East and West India Dock Company *v. Littledale*, 7 Hare 57.

² 2 Sm. & Giff. 141.

³ Jac. 202.

⁴ 2 My. & Cr. 581.

Then the bill was filed on the 1st of August by Mr. Thomas, and it was an imperfect bill—a bill which he must have known could not settle the question. It did not purport or affect to remove out of the way of the insurance company the difficulty as to the payment of the money. They throughout had said that they were ready to pay, and anxious to pay, and all they wanted was, that they should not be vexed by a double litigation.

They were told positively that if they paid Thomas, the legal hand to receive would hold them responsible for any error. In that state of things Thomas thought it right to file an imperfect bill, which did not remove the difficulty out of the way of the insurance company. As he did not make Mrs. Black a party to that bill, it was quite impossible for the insurance company to pay the money into court in that suit. It does appear to me that the bill filed on the 9th of August by the insurance company is some evidence of their *bona fides*. They did not want to keep the money, and they certainly had no bias toward one claimant or the other. It is sometimes suggested that money is not paid by a stakeholder because he prefers holding it, but this cannot be said of the insurance company, for they were ready to get rid of the money the moment they could do so with safety. They were not able to pay it in, in a suit to which only one of the claimants was a party, and accordingly they filed a short bill, which, I think, raises every question, conceals nothing, and misrepresents nothing, considering what are the facts necessary to be stated in an interpleader bill where the plaintiff proposes to bring into court at once the money which is in dispute, and asks for no order except upon that condition. Of course it would be a most material thing if he concealed a fact which showed that he had contracted with one of the parties; but if he has not concealed a fact of that kind, it does appear to me that it would not be right to encourage the insertion in interpleader bills of long narratives and correspondence for the purpose of showing that there has been no contract with one of the parties. It appears to me, therefore, that some order for an injunction was right at the time when the Vice-Chancellor granted the injunction.

Then it is said that the order which was made ought not to have been an order to stay the prosecution of the other suit. It is first of all said that the existence of a suit in this court by one of the claimants was a sufficient reason why the court should not have granted the injunction; but I think the case of *Warington v. Wheatstone*¹ is clear upon that point, and is a very distinct authority that there is a reason for coming to this court by way of interpleader, when one

¹ Jac. 202.

claimant insists that she will hold the company responsible if they pay the adverse claimant. One of the claimants was proceeding in equity to enforce payment, and the other was declaring that she would hold the company responsible if they paid that claimant; and it appears to me that that was a reason why the company should force them to interplead. If Thomas had proceeded at law it would not have been in his power to have made Mrs. Black a party to the litigation; but, having determined to come into a court of equity, nothing would have been easier for him than to have made her a party. He knew that she was a person claiming; he knew that the only reason the company alleged for not paying was, that she was making an adverse claim, and therefore a *bona fide* litigation by him ought to have included Mrs. Black as a party to his suit. Certainly the existence of that suit did not stand in the way of the plaintiffs filing a bill of interpleader.

Then it was said that the order ought not to have stayed the prosecution of that other suit. At first I was disposed to think that the course of the court generally is to leave every suit in equity to stand or fall upon its own merits, and not in one suit to grant an injunction to stay or restrain proceedings in another; but the case of Warington *v.* Wheatstone¹ serves to show that an injunction in an interpleader suit may extend to restrain proceedings in equity as well as at law against the stakeholder, as appears from the decree which is given in Seton on Decrees;² and the case of Sieveking *v.* Behrens³ seems to have been to the same effect. I am, therefore, not able to say that the order for the injunction was in any respect wrong, and I think that Thomas, the plaintiff in the other suit, having chosen to institute that suit, it was right to bring the money into court in a suit to which Mrs. Black was a party, and to restrain all other proceedings in the matter. I think there is nothing inconsistent with the course of practice to say that the injunction should extend, as the Vice-Chancellor originally extended it, to stay proceedings in equity as well as at law, and therefore that his original order was right.

Order of the Vice-Chancellor dissolving the injunction discharged.
No costs of the appeal. The costs in the court of the Vice-Chancellor Malins to be dealt with by the Vice-Chancellor at the hearing.
Liberty to apply in Thomas's suit for the costs of that suit.

¹ Jac. 202.

² Vol. II., p. 962, 3d Ed.

³ 2 My. & Cr. 581.

BURNETT *v.* ANDERSON AND OTHERS.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 27, 1816.

[Reported in 1 *Merivale* 405.]

THE plaintiff was a wharfinger, and by his bill called upon the defendants to interplead as to certain goods, which, on the 17th of May, had been landed at his wharf, in the name of Law. It was alleged that the defendant Anderson claimed, as the purchaser from Law, in the course of business; Law having, on the 17th of May, given a valuable consideration for the goods to Bogle, French & Co.

The defendant Callaghan had sold the goods to Bogle, French & Co., who, on the 17th of May, previously (as it was alleged) to the complete delivery of the goods, had become bankrupt; and Callaghan claimed as an unpaid vendor, entitled to stop *in transitu*.

The defendant Shaw, as the assignee under the commission against Bogle, French & Co. contended, first, as against Callaghan, that there had been a complete delivery on the 17th, so as to vest the property in the bankrupts and preclude a stoppage *in transitu*: and, as against Anderson, that, on the 17th of May, previously to the delivery of the goods to Law, Bogle, French & Co. had notoriously committed acts of bankruptcy, and had become insolvent; and that the goods in question had been delivered to Law, either after, and with notice of, those circumstances; or by way of fraudulent preference, and in contemplation of bankruptcy.

Anderson had brought an action, and the others threatened it. The plaintiff stated his inability to determine the validity of these oppositely stated claims, either in fact or in law.

The defendant Anderson, by his answer, stated that the plaintiff had delivered the goods in question to the defendant Callaghan under an indemnity. A motion was made upon the above circumstances, to restrain Anderson from proceeding in his action.

Against the motion it was contended that the plaintiff, having parted with the goods, could not comply with the condition upon which alone the court interposes in cases of this nature, viz., the delivery, in the result, of the subject of dispute to the party entitled; and, secondly, that the plaintiff having taken an indemnity from one of the parties, had provided for himself a remedy against the mischief of conflicting claims. It was at least difficult to say that, as to one of the parties, there was not collusion.

In answer to these objections, the facts were relied on, that the defendant had undertaken, and was prepared, to pay the value of the goods into court; that the goods were of a perishable nature; that

this course was most advantageous to all the parties interested ; and, lastly, that the plaintiff's being indemnified as to one of the litigants was no reason why the court should not procure him an indemnity as against the others, who were harassing him ; the question of collusion being concluded by the affidavit annexed to the bill.

Rose in support of the motion.

Sir S. Romilly and *Courtenay* against it.

N. B.—Callaghan, one of the defendants, was resident in Ireland ; as to which see *Stevenson v. Anderson*.¹

The LORD CHANCELLOR refused the motion upon the first point, declaring it to be his opinion, that the plaintiff, having parted with the goods, stood no longer in a situation entitling him to put the claimants to an interpleader. It was not enough to say that, in the result of such a proceeding, the party entitled might have the value of his property ; he was entitled to it specifically.

MITCHELL *v.* HAYNE.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., MAY 28, 1824.

[Reported in 2 *Simons & Stuart* 63.]

THE plaintiff was an auctioneer, and had sold an estate for one of the defendants. The other defendant was the purchaser, and had commenced an action against the plaintiff for the deposit ; upon which the plaintiff filed a bill of interpleader against him and the vendor, and prayed for an injunction to restrain the action.

Mr. Agar and *Mr. Crombie*, for the plaintiff, now moved for the injunction, and offered to pay the deposit money into court, after deducting the duty and commission.

Mr. Koe, for the purchaser, opposed the motion.

The VICE-CHANCELLOR. Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants. That is not this case. The plaintiff receives a deposit of £87 18s. 9d., and claims, against both the defendants, to retain £27 16s. 10d. for his commission and the auction duty. And, by this motion, the plaintiff calls upon the defendants to interplead for the sum of £60 1s. 11d., which he desires to pay into court. But the bill itself states that the action which is threatened by the defendant, the purchaser, is for the whole deposit of £87 18s. 9d., and not for the

¹ 2 *Ves. & Beames* 407.

sum of £60 1s. 11d. only, which is all that the defendant, the vendor, could claim. The plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the defendant, the purchaser; and, if he seeks an injunction, must obtain it, not upon the principle of interpleader, but upon an order for time, or upon the answer.

THE BALTIMORE & OHIO RAILROAD COMPANY, RESPONDENT, *v.* ALEXANDER T. ARTHUR, IMPLEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 17, 1882.

[*Reported in 90 New York Reports 234.*]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made January 12, 1881, the substance of which is hereinafter stated.

The complaint in this action shows that before August 20, 1880, the plaintiff bought and received of the defendant Arthur, merchandise, of the value of \$2,478.52, less \$21.83 to be deducted for freight due for transportation of said merchandise, but were forbidden to pay Arthur, by defendant Power, "acting as receiver," who claimed the said purchase-price, and threatened to sue therefor; that Arthur in June, 1881, brought a suit, which is still pending, against the plaintiffs for the said sum of \$2,478.52. The plaintiff also avers that it is unable to determine which of the defendants it ought to pay; it denies collusion with either, and offers to pay the amount in dispute into court. Attached to the complaint is an affidavit by the plaintiff's agent, and a copy of the account and notice of Power's claim. The account runs in favor of "John B. Power, Receiver Chrome Steel Co.," includes the merchandise for the price of which the plaintiffs are sued by Arthur, and the notice is in these words:

"GENTS: I hand you the foregoing statement, although I am not prepared to say you should pay me, but I caution you against paying any one but me, for upon the adjustment of the transactions had between the Chrome Steel Company and Mr. Alex. T. Arthur, I may be found entitled to receive payment, in which event I shall require it made to me, and in default shall proceed to compel such payment.

"Respectfully,

"JOHN B. POWER, *Receiver.*"

Upon these papers an order was granted by a justice of the Supreme Court, in New York City, requiring the defendants to show cause why the proceedings on the part of Arthur in the suit brought by him

should not be stayed, and why Power should not be restrained from commencing suit. At the time stated for showing cause, it was made to appear by Arthur that his action against the present plaintiff was brought in the Supreme Court in Kings County, and that a motion had been made by the defendant (plaintiff here) to substitute Power, as defendant therein, in its place, and for leave to pay the money into the court in discharge of its liability; that the motion was denied at a Special Term held in that county. Power appeared by counsel, who orally claimed the money, but stated no reason for his claim. The judge before whom the order to show cause was returnable denied the motion. Upon appeal to the General Term of the first department, that court ordered that "the plaintiffs be allowed to pay into court the amount stated in the complaint to be due from them, after deducting the costs of this action," and thereupon they be discharged from liability to either defendant.

It also reversed the order made in the Arthur suit, and required the defendants in this action to interplead between themselves as to their rights or claims upon the fund. The defendant Arthur appeals to this court.

Joseph M. Pray for appellants.

Edward D. McCarthy for respondent.

DANFORTH, J. The order should be reversed.

First. No appeal was taken from the order made in Kings County in the suit between Arthur and this plaintiff, and it was not within the jurisdiction of the General Term.

Second. The rest of the order is not warranted by the facts before the court. It cannot stand upon the Code. Section 820, cited by the respondent, was no doubt applicable to the case sought to be made by the defendant (plaintiff here) in the action brought by Arthur. It there moved as defendant, and sought the relief offered to a litigant in that character, but its case did not satisfy the court, and the present suit is not within the statute.¹ It applies only to proceedings by motion, and by a defendant.

Third. No new facts were presented in this case, and the plaintiff acquired no additional right by changing the form of its proceeding. According to the settled doctrine of equity, a party acknowledging himself a debtor may, when subjected to a double demand for payment, have relief on showing that there is a question to be tried and that he is ignorant which claimant has the better right. But here the sum admitted to be due is not the sum for which Arthur sues. The plaintiff claims to retain from it an alleged indebtedness for freight. The amount due cannot be the subject of controversy in an inter-

¹ § 820, *supra*.

pleader suit, and this difference between the debt claimed by the defendant, and the sum which the plaintiff is willing to pay, presents an insuperable objection to its prosecution; for as to so much, it does not admit title, or right of payment in either claimant.¹ In the next place, the plaintiff is not shown to incur any hazard in paying according to its contract. The transaction between it and Arthur was of the simplest kind—a purchase of goods at a fixed price; on the other hand, no title or color of title is given to Power.² Nor does he claim to be entitled. On the contrary, he says he is "not prepared to say" the plaintiff "should pay him." At most, his declaration is that upon some adjustment in future of unnamed transactions between the Chrome Steel Company and Arthur, he may "be found entitled to receive payment." The mere pretext of a conflicting claim is not enough to show that the plaintiff is in any danger of loss from an inability to determine to whom the debt in question should be paid. The relation between itself and Arthur is the ordinary one of vendee and vendor, and it was a sufficient answer to the motion that the plaintiff showed no such claim of right in Arthur's co-defendant, as he might interplead for, and by its allegations bring in question the amount due to either. A debtor cannot, in this summary manner, discharge a creditor with partial payment, or prevent him from enjoying the fruits of his bargain.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

KILLIAN AND ANOTHER, TRUSTEES, *v.* EBBINGHAUS,
TRUSTEE.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 3, 1884.

[Reported in 110 *United States Reports* 568.]

THIS was a suit in equity commenced by defendant in error as plaintiff below, against persons in possession of a tract of land in Washington and claiming title, to have a trust declared in the plaintiff below as to said land, and the legal beneficiaries under the trust ascertained. The defendants below denied the trust and set up adverse title. The decree below was in favor of the plaintiff there, from which the defendants below appealed.

Mr. Henry Wise Garnett and Mr. Conway Robinson, Jr., for appellants.

¹ Sto. Eq. Pl. § 295; ² Sto. Eq. Jur. § 821.

² Sto. Eq. Pl. § 293.

Mr. F. P. Cuppy and *Mr. P. E. Dye* for appellee.

Mr. Justice Woods delivered the opinion of the court.

The bill in this case was filed by John W. Ebbinghaus, the appellee, as trustee for the German Calvinist Society and their legal representatives. His appointment as trustee was brought about in the following manner: On July 16, 1877, August Sievers, Edward Kolb, and Ludwig Freund, as trustees of the First German Reformed Church of Washington, D. C., filed their petition in the Supreme Court of the District of Columbia, in which they represented that on June 28, 1793, one D. Reintzel held, as trustee, in trust for the "German Calvinist Society," lot 9 in square 8o of the city of Washington; that the "German Reformed Church" was the legal counterpart and successor of the "German Calvinist Society," and that the petitioners were the only beneficiaries of the trust estate; that Reintzel, the trustee, was dead and no successor had been appointed. They, therefore, prayed that John W. Ebbinghaus, the pastor of the First Reformed Church of the city of Washington, might be appointed trustee, as the successor of Reintzel.

On the day on which the petition was filed, the Supreme Court of the District, without notice or service of process, appointed Ebbinghaus trustee in the place of Reintzel, to hold, as trustee, the said property "for the German Calvinist Society and their legal successors, in accordance with the intent of Jacob Funk, the original donor."

Ebbinghaus believed, for he so testifies, that the real estate in question was the property of the First Reformed Church. When giving his deposition in this case he was asked: "Do you consider that this lot belongs to your church?" His answer was, "Yes, sir; most emphatically."

With this belief, on the day next after his appointment as trustee, and in pursuance of an understanding entered into with the trustees of his church before his appointment, he filed the bill in this case.

It alleged that the appellee, Ebbinghaus, was the trustee and legal owner of lot 9, in square 8o, in the city of Washington, in the District of Columbia; that the property mentioned was given in trust by one Jacob Funk to D. Reintzel, as trustee, to hold for the use and benefit of the "German Calvinist Society," and that he held the property as the successor to D. Reintzel, deceased, for said society and their legal representatives, in accordance with the intent of Jacob Funk, the original donor.

The bill further averred that Ebbinghaus held the property in trust for the legal successors and beneficiaries of the trust, whoever they might be, and was ready to pay the rents, issues, and profits

arising therefrom into court to be disposed of as the court might direct, and faithfully perform the duties of trustee; and that he brought his bill to have the court decide who were the legal beneficiaries under said trust.

The bill further averred that the defendants John G. Killian, John Schenck, and John Schneider, trustees of the German Evangelical Concordia Church of the city of Washington, claimed to be the legal beneficiaries and entitled to the rents and profits of the trust property for religious purposes, and had already received and converted to their own use a large sum of money, the rents of the property, without the consent of Reintzel or his legal representative, or of the appellee.

The bill also averred that the defendants August Sievers, Edward Kolb, and Ludwig Freund, trustees of the First Reformed Church of the city of Washington, claimed to be the legal successors of the German Calvinist Society, and the legal beneficiaries of the trust, and entitled to the rents, profits, and estate of and in said property, and were "expected to sue the complainant for the recovery of their supposed rights."

The prayer of the bill was for an account of the rents and profits of the trust estate received by the trustees of the German Evangelical Concordia Church, and for the payment into court of the amount found due from them; that the trustees of the two church societies mentioned in the bill might be respectively enjoined from bringing suit against Ebbinghaus on account of, and from further interference with, the trust property during the pendency of the present suit, and that they might be required to interplead together, and that Ebbinghaus might be indemnified.

The defendants Schenck and Schneider filed their joint answer, in which they denied that Ebbinghaus was the trustee and legal owner of the real estate described in the bill, and averred that they and the defendant John G. Killian, their associate trustee, were the only lawful and equitable trustees of the property. They denied that Ebbinghaus, whom they averred to be an interloper, held the property as trustee or successor to D. Reintzel, or as successor of any one having title thereto, or that he held it for the benefit of the legal successors and beneficiaries of the trust.

The defendants Siever, Kolb, and Freund, styling themselves trustees of the First Reformed Church, filed their joint answer admitting all the averments of the bill.

Upon final hearing of the case upon the pleadings and evidence the Supreme Court of the District of Columbia, in special term, dismissed the bill without prejudice. Upon appeal to the Supreme

Court of the District, in general term, the decree of the special term was reversed, and the court decreed that Ebbinghaus, as trustee as aforesaid, be authorized and empowered to take possession of the property described in the bill, and hold the same as trustee for the First Reformed Church in the city of Washington, D. C., and receive the rents and profits thereof, and account therefor as such trustee to said First Reformed Church ; that the trustees of the German Evangelical Concordia Church be enjoined from further interfering with said real estate, or with the receipt of the rents and profits thereof by Ebbinghaus, and that they account to him for the rents received by them since the filing of the bill in this case. The present appeal brings this decree under review.

The appellants contend that the decree of the court below should be reversed because the suit is not one of which a court of equity could take jurisdiction, and the decree is not one which it was competent for such a court to make. We think this contention is well founded.

The bill is either a bill of interpleader or a bill in the nature of a bill of interpleader. It is clear that it cannot be sustained as a bill of interpleader. In such a bill it is necessary to aver that the complainant has no interest in the subject-matter of the suit ; he must admit title in the claimants and aver that he is indifferent between them, and he cannot seek relief in the premises against either of them.¹ In this case the bill fails to comply with any of these requirements.

If the complainant were in possession of the property in question, holding it for the party beneficially interested, and had custody of rents and profits derived therefrom, and the two sets of defendants asserted conflicting claims to the property and to the rents, the facts might sustain a bill of interpleader. But the complainant is out of possession ; he has no rents in his custody. He is, therefore, in no jeopardy from the conflicting claims of the defendants, and cannot call on them to interplead. Instead of admitting title in the two sets of claimants, and asking the court to decide between them, he sets up title in himself for the benefit of one set, and seeks relief against the other.

To avoid these obstacles to the maintenance of the suit, the appellee insists that it can be maintained as a bill in the nature of a bill of interpleader. In support of this view, his counsel cites sec-

¹ *Langston v. Boylston*, 2 Ves. Jr. 101; *Angell v. Hadden*, 15 Ves. Jr. 244; *Mitchell v. Hayne*, 2 Sim. & Stuart 63; *Aldrich v. Thompson*, 2 Bro. Ch. 149; *Metcalf v. Hervey*, 1 Ves. 248; *Darthez v. Winter*, 2 Sim. & Stuart 536; *Bedell v. Hoffman*, 2 Paige Ch. 199; *Atkinson v. Manks*, 1 Cow. 691.

tion 824 of Story's *Equity Jurisprudence* (11th ed.), where it is said that "there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, when there are other conflicting rights between third persons."

But in all such cases the relief sought is equitable relief.¹ The authority cited by the appellee does not, therefore, aid the bill in this case, which is that of a party out of possession claiming the legal title to real estate, seeking to oust the parties in possession, who also claim the legal title, and [to] compel them [to] pay over the rents and profits.

The fatal objection to the suit is that it is in fact an attempt by the party claiming the legal title to use a bill in equity in the nature of a bill of interpleader as an action of ejectment. The record makes this apparent. At the instance of the trustees of the First Reformed Church, the appellee was appointed by the Supreme Court of the District of Columbia to hold the property in trust for that church. His appointment was obtained that he might bring this suit in the interest of the First Reformed Church against the trustees of the German Evangelical Concordia Church. He alleges in his bill that he has the legal title to the premises in controversy, of which it is clear from the record that he is out of possession. Having no rents or profits in his keeping, he seeks to recover them from one body of trustees, and asks the court to decide to which of the two bodies of trustees claiming the property he shall pay them when he has recovered them.

The answer of Schenck and Schneider denies that the appellee is the legal owner of the property, or that he holds it as trustee. They aver that the title to the property is in them as trustees of the German Evangelical Concordia Church. Upon the filing of the answer the point of controversy between the parties plainly appeared. Both claimed to own the legal title, and the defendants were in possession. The issue thus raised could only be tried in an action at law. The decree of the court below is the equivalent of the judgment of a court of law in an action of ejectment, namely, that the plaintiff recover possession of the premises; and also of the judgment of a court of law in an action of trespass for mesne profits, that he recover rents and profits. There is no ground for calling such a suit a bill of interpleader of any kind.

There are no averments in the bill which disclose any other grounds of equity jurisdiction. It is clear that an action of eject-

¹ *Mohawk, etc. Railroad v. Clute*, 4 Paige 384; *Parks v. Jackson*, 11 Wend. 442; *McHenry v. Hazard*, 45 N. Y. 580.

ment would have afforded the appellee a plain and adequate remedy.

The case is similar to the leading case of *Hipp v. Babin*,¹ which was dismissed by the Circuit Court on the ground that there was an adequate remedy at law. Upon appeal to this court the decree was affirmed. This court, speaking by Mr. Justice Campbell, described the case as follows :

"The bill in this case is in substance and legal effect an ejectment bill. The title appears by the bill to be merely legal. The evidence to support it appears from documents accessible to either party, and no particular circumstances are stated showing the necessity of the courts interfering, either for preventing suits or other vexation, or for preventing an injustice irremediable at law."

And the court declared as a result of the argument, "that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by a jury."²

And this objection to the jurisdiction may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel.³

These and many similar authorities, which it is unnecessary to cite, are applicable to the case in hand. They show that the court below was without jurisdiction to entertain the suit and render the decree appealed from.

Its decree is therefore reversed, and the cause remanded, with directions to dismiss the bill without prejudice.

¹ 19 How. 271.

² See also *Parker v. Winnebago Lake Cotton and Woolen Manufacturing Company*, 2 Black 545; *Grand Chute v. Winegar*, 15 Wall. 373; *Lewis v. Cocks*, 23 Wall. 466.

³ *Parker v. Winnebago Lake Cotton and Woolen Manufacturing Company* and *Lewis v. Cocks*, *ubi supra*.

BRADFORD L. WILLIAMS *v.* GEORGE F. MATTHEWS
ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1890.

[Reported in 47 *New Jersey Equity Reports* 196.]

ON motions to strike out parts of answers.

Mr. Lewis Starr for the complainant.*Mr. G. A. Vroom* for Pfeiffer & Sons; *Mr. William H. Jess* for Marshall and others; *Mr. H. M. Snyder* for Budd & Bro.; *Mr. Howard Carrow* for Matthews and others.

GREEN, V. C. Bradford L. Williams, the complainant, on the 29th day of October, 1889, entered into a contract in writing with George F. Matthews, one of the defendants, whereby the latter agreed to build for the former three houses in the city of Camden. The bill makes no further statement as to the terms of the agreement, not giving the amount of money agreed to be paid, or the times or terms of payment. It alleges that the contract was filed in the office of the clerk of Camden County, November 4, 1889. It does not allege whether the houses have been completed according to contract or not, or how much he has paid on account of said buildings. It simply states that there is due from complainant to Matthews, on account of the agreement for building said houses, the sum of \$1,416.13, and that the other defendants, at various times, served notices upon him, as creditors of Matthews, to retain in his hands the amount of their respective claims. The bill prays that the defendants interplead, and on paying the money into court the usual injunction was issued.

The defendant Matthews, the contractor, in his answer, among other things, denies that there is due to him only the sum of \$1,416.13, and avers that there is due him from complainant on said contract the sum of \$2,050, for building said houses. He insists that a full account should be taken, and that complainant should produce before the court all books and papers relating to the contract and its execution.

The answers of the other defendants contain averments of the same import, substantially, as that of Matthews, but with less definiteness as to amount.

Motion is made, under the rule, to strike out so much of the several answers as raise a question as to the amount due as stated in the bill, and as relates to the production of books and papers and accounting.

This purports to be a bill of strict interpleader. The claim of

Matthews, from which complainant seeks relief by this bill, is the amount due him on his contract. The claims of the other defendants are for specific portions of that balance, and as they aggregate more than that sum, there is a strife as to priorities. The money due on that contract is the subject-matter of the controversy.

To sustain such a bill, it is necessary that the complainant have no interest in the thing in controversy, and he should, in his bill, state his own rights so as to negative any such interest.¹ In his bill he must state his own claims.²

The bill, to justify its pretensions as a bill of strict interpleader, should have given so much of the contract, and its execution and payments under it, as would have demonstrated to the court that there was only a certain amount due, with reference to which the complainant was simply a stakeholder. If, on complainant's presentation of the case, it appears on the face of the bill that it is not a proper case for interpleader, demurrer will lie. But if the bill should show such a case, a defendant may, by answer, deny the allegations in the complainant's bill, or set up distinct facts in bar of the suit, and such issue is to be tried according to the practice of the court.³

Portions of these answers objected to, question the amount stated in the bill to be due on the contract. While it is not a matter over which an issue can be framed for settlement in a suit of strict interpleader, it may be inquired into to ascertain if the action is maintainable, that is, as the only proper decree is that the defendants interplead or the bill be dismissed, the decree cannot adjudge this or that amount due, but the amount offered to be paid into court may have a controlling influence in deciding if the complainant is simply a disinterested stakeholder, and for that purpose be inquired into. There is nothing on the face of this bill to demonstrate what is due; the averment is made, but no facts are given to verify the statement. If, as was alleged on the argument, the complainant made his own adjustment of his own claims, made allowances to himself and struck his own balance, over which he asks the defendants to litigate, they are not to be concluded by his averring that such sum is the amount due, and that he is indifferent. They may, by answer, show he is not so, and is interested in the matter of the controversy. In *Crawshay v. Thornton*,⁴ Sir L. Shadwell, V. C., says, "Interpleader is where the depositary holds as depositary merely, and the claims are made against him in that character only."

¹ Story Eq. Pl. § 292.

² Mitf. Pl. 49.

³ Story Eq. Pl. § 297a; 2 Dan. Ch. Pr. 1675; *City Bank v. Bangs*, 2 Paige 570; *Statham v. Hall, Turn. & R.* 30; *Hall v. Baldwin*, 18 Stew. Eq. 858, 865.

⁴ 7 Sim. 391, 397.

In *B. & O. R.R. v. Arthur*,¹ plaintiff, being sued by one Arthur for \$2,476.52 for merchandise, and being warned by one Power not to pay Arthur, brought suit, tendering to pay into court the \$2,476.52, less \$21.83 to be deducted for freight due for transportation of the merchandise. Judge Danforth, delivering the opinion of the Court of Appeals, among other things, said : "The plaintiff claims to retain from it [the value of the goods] an alleged indebtedness for freight. The amount due cannot be the subject of controversy, in an interpleader suit, and this difference between the debt claimed by the defendant and the sum which the plaintiff is willing to pay, presents an insuperable objection to its prosecution, for, as to so much, it does not admit title, or right of payment, in either claimant."

In *Mitchell v. Hague*,² plaintiff was an auctioneer, and had sold an estate for one defendant. The other defendant was the purchaser, who had commenced an action against the plaintiff for the deposit. The bill was filed for an interpleader and injunction to restrain the prosecution of the action. It appeared that the plaintiff had received a deposit of £87, and claimed to retain £27 as his commissions, and called on defendants to interplead as to £60. Sir John Leach, V.C., said, "The plaintiff is not an indifferent stakeholder, but has a personal question to maintain with the purchaser," and refused an injunction.

In *Bignold v. Audland*,³ the case, as made by the bill, raised one question as to whether plaintiff was chargeable with interest on the amount in hand, and another as to costs in an action with reference to the stake money. Sir L. Shadwell, V.C., said, "It is obvious that the plaintiff has an adverse claim in respect to the subject-matter of the bill," and held it not a case of interpleader.

In *Moore v. Usher*,⁴ £500 had been placed in the hands of plaintiff for a certain purpose ; he had paid out £60, as he claimed, lawfully ; he was sued by the administrator of the party depositing the money for the whole amount, and for the £440 by another person who claimed to have earned that sum—the balance in hand. Plaintiff filed his bill to require defendants to interplead as to the £440. The Vice-Chancellor, on a motion for an injunction on the payment of £440 into court, said,⁵ "The plaintiff stands in a position in which no plaintiff in a bill of interpleader ever stood before, for he has to litigate a question as to the right to part of the fund with one of the litigant parties."

Under these authorities, if the amount brought into court is not the difference between the payments and the contract price, but the re-

¹ 90 N. Y. 234.

² 2 Sim. & S. 63.

³ 11 Sim. 23.

⁴ 7 Sim. 384.

⁵ At p. 390.

sult of complainant's own adjustment of deductions he thinks should be made, the defendants are entitled to show that the amount has been so fixed, and to make the averments to that end in their answers. We are not without precedent in our own State for an investigation of this character in such a suit. *Supt. and Trust. Pub. Schools v. Heath*¹ was an interpleader by complainants, who were indebted to the contractor for building, there being mechanics' lien claims for more than the amount admitted to be due. An order of reference was made to a master to ascertain and report the amount of the debt due to the contractor, and the respective amounts of the several claims of the defendants and their order and priority. Although it is stated in the opinion that the suit had been amicably conducted, and that no technical or formal objections had been suggested or relied upon, no adverse criticism is made with reference to the inquiry into the amount actually due.

I am of opinion that the defendants are entitled to aver and prove any facts which show that the complainant is not entitled to maintain his action as a strict interpleader, and will advise an order denying so much of the motion as proceeds against those parts of the answers respectively taking issue with the averment of the bill as to the amount due, and alleging defects in the bill for insufficient statements of the amount. As to so much of the answers as look for specific relief, none can be given, and the motion to that extent should be granted.² I will settle the parts of each answer to be stricken out, under the views herein expressed, at the convenience of counsel.

AMOS STONE *v.* FRANKLIN O. REED AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER
4, 1890.

[*Reported in 152 Massachusetts Reports 179.*]

BILL OF INTERPLEADER, filed in this court by Amos Stone, against Franklin O. Reed, Francis A. Brooks, and Joseph E. Bartlett, alleging that certain land and flats were, on January 16, 1852, owned by sundry persons in severalty, who on that day united under a written agreement for the purpose of holding the said land and flats as tenants in common and undivided as to the whole premises, in proportion to the length of shore line owned by each, and for the purpose of being formed or organized into a corporation, which was done under the name of the Mystic River Corporation, as authorized by

¹ 2 *McCart.* 22.

² *Wakeman v. Kingsland*, 1 *Dick. Ch. Rep.* 103.

the St. of 1852, c. 105, granting its charter; that the land and flats of the said proprietors were thereupon taken possession of and controlled and managed by the corporation, as if the same had become its property, although no written conveyance of the said lands to the corporation was ever made or executed by the proprietors or by any of them; that no shares of capital stock were ever issued, and no subscriptions therefor in money were ever obtained, as allowed by the said act; that the share or interest of each of the original proprietors in the lands so commingled by them was duly ascertained and determined, and certificates were issued to the several proprietors in the name of the corporation, setting forth the proportion or ratio of the ownership of each in the whole, the whole estate being for that purpose divided into 2,038 equal parts; that these certificates showing the fractional ownership in common and undivided of these flats and lands, were assigned and transferred from time to time, and used by the proprietors to convey the title of the lands and flats, the property itself always being treated by the corporation and the proprietors as real estate, and not as shares of corporate stock or personal estate of any description; that by the St. of 1887, c. 278, the Boston and Lowell Railroad Corporation was authorized to purchase these lands or flats, or such of them as still remained in the possession, control, and management of the Mystic River Corporation, and a conveyance of the lands was made, executed, and delivered to the railroad corporation by or in the name of the Mystic River Corporation on August 2, 1887, under the authority or supposed authority of the said act; that it was provided in and by the said act of 1887, that upon the execution of such conveyance the Mystic River Corporation should cease to exist as a corporation, except as provided in and by the Pub. Sts. c. 105, § 41; that the plaintiff is advised and believes that thereupon the said corporation did cease to exist on August 2, 1887, except as aforesaid; that at and before the time of such sale and conveyance the plaintiff was the treasurer of the said Mystic River Corporation and one of its directors, and that payment for said land and flats was made in the notes or bonds of the said railroad corporation of \$1,000 each, to the number in all of 325, of the value of \$325,000 or thereabouts; that said bonds came into the hands of this plaintiff; that after providing for and paying all admitted indebtedness of the corporation outstanding at the time of the conveyance, the said notes or bonds were divided among the proprietors or certificate holders in proportion to the number of rights or undivided 2,038 parts of the property owned by them respectively; that there still remained in his hands and possession of the said notes or bonds sixty-one pieces of \$1,000 each; that the defendant Bartlett, on August 2, 1887, soon after the execution of the

said conveyance, brought a bill in equity in this court against the plaintiff and the said corporation, wherein he claimed to hold the plaintiff accountable to him as the alleged creditor of the defendant corporation for the said notes or bonds remaining in this plaintiff's hands and possession, and sought to prohibit and prevent the plaintiff from parting with them to any other person or party ; that the suit of the said Bartlett was still pending and undetermined in this court ; that Franklin O. Reed and Francis A. Brooks, being proprietors or holders of certificates issued as aforesaid by the corporation, claiming to act in behalf not only of themselves but of all other like certificate holders excepting Bartlett, made a demand on the plaintiff for the said notes or bonds, except the share of Bartlett, claiming the said notes or bonds as the property of themselves and the other certificate holders represented by them, and denying all right of Bartlett as an alleged creditor of the corporation to require the plaintiff to retain or hold the notes or bonds for his use and benefit, or to deliver them over to Bartlett under his said legal process or proceeding ; and that the plaintiff was ready and willing to deliver the said notes or bonds remaining in his hands to whichever of the defendants claiming the same are or shall by this court be found entitled thereto. The bill also denied collusion, and prayed that Reed and Brooks, and Bartlett, might be decreed to interplead and settle their rights to the said notes or bonds.

Annexed to the bill were copies of the articles of association entered into by the proprietors of the flats on January 16, 1852, and of the St. of 1852, c. 105, §§ 1, 6, and the St. of 1855, c. 481, both relating to the Mystic River Corporation.

The defendant Bartlett demurred to the bill for want of equity ; Devens, J., sustained the demurrer, and dismissed the bill ; and the plaintiff appealed to the full court.

A. S. Hall for the plaintiff.

A. E. Pillsbury for the defendant Bartlett.

W. ALLEN, J. The bill alleges that three hundred and twenty-five bonds of the Boston and Lowell Railroad Corporation, of one thousand dollars each, came into the hands of the plaintiff, and that sixty-one of them remain in his hands and possession ; that the defendant Bartlett has brought a bill in equity against the plaintiff and the Mystic River Corporation to reach and apply these sixty-one bonds upon a debt alleged to be due to him from the corporation ; and that the other defendants claim that the bonds are their individual property, and have demanded them of the plaintiff. The bill is defective in not showing any title in the plaintiff to the relief sought. Assuming that, if he held the bonds as a stakeholder, he would have a right to

require the defendants to interplead, as in *Cobb v. Rice*,¹ the bill must show what his relation to the bonds is, and that it is such as to entitle him to the relief. The only direct allegation in that respect is, "that said bonds came into the hands of this plaintiff." This is consistent with a tortious possession, or with a possession as bailee or agent of one of the parties defendant. The absence of a direct allegation of the character of the plaintiff's possession of the bonds might be cured if there were allegations in the bill which afforded an inference that his possession was that of a stakeholder, or such as to entitle him to maintain a bill of interpleader. Upon reference to the allegations of the bill, it appears that no inference can be drawn from them in regard to the character of the plaintiff's possession of the bonds, unless one which shows that he has no title to the relief sought.

The bill alleges that the Boston and Lowell Railroad Corporation bought of the Mystic River Corporation certain land and flats, and that payment therefor was made by the three hundred and twenty-five bonds referred; to that the plaintiff was the treasurer and one of the directors of the Mystic River Corporation; and that the bonds came into his hands. The bill further alleges, that, after providing for the admitted indebtedness of the corporation, the bonds were divided among the proprietors or certificate holders (who were the corporators), and that the sixty-one bonds referred to remained in the hands and possession of the plaintiff. The only inference which can be drawn from these allegations is, that the bonds were the property of the Mystic River Corporation, and were received as its property by the plaintiff, as its treasurer, and that the sixty-one bonds not divided are held by the plaintiff as treasurer of the corporation, as its property. This inference is not at all affected by the allegations of the bill in respect to the claim to the bonds made by the defendants, the proprietors or certificate holders, or corporators. That claim, as stated in the body of the bill, is substantially this: that in the year 1852 certain owners in severalty of flats made an agreement for the purpose of holding the same in common in certain proportions, and of forming a corporation; that a corporation was accordingly formed, under a special charter, which took possession of the lands and flats of the proprietors, and controlled and managed them as its own property, but that no conveyance was made by the proprietors to it; and that certificates were issued by the corporation to the proprietors showing the proportion of the common property which belonged to each.

The claim of the defendants, as stated, is that the proceeds of the sale belong to them individually, because they did not make a formal conveyance to the corporation composed of themselves when it took

¹ 130 Mass. 231.

possession of the flats more than thirty years before. It is obvious that the allegation that the defendant corporators claim a title paramount to that of the corporation cannot affect the allegations, direct or implied, that the sale authorized by the Legislature was of the property of the corporation, that it was sold by the corporation and conveyed by it as its property, and that the bonds were received in payment to the corporation by the plaintiff as its treasurer, as allegations affecting the character in which the plaintiff received and holds the bonds ; and it is unnecessary to consider whether the point urged by the defendant Bartlett, that the exhibits contradict the allegations in the body of the bill, and show that the title and interest in the property sold was in the corporation, can be sustained, nor what effect it would have, if sustained, on the demurrer to the bill. It is too plain for argument, that if the bill alleges that the plaintiff holds the bonds as treasurer of the corporation, and that the defendant corporators claim by a title paramount to the corporation, it cannot be maintained. Without deciding other objections to the bill made in argument, we sustain the demurrer, upon the ground that the bill contains no averments in respect to the possession of the plaintiff which show that he is entitled to maintain the bill.

Decree affirmed.

JOSEPH A. WING, ADMR., *v.* CHRISTOPHER S. SPAULDING
AND OTHERS.

IN THE SUPREME COURT OF VERMONT, OCTOBER, 1891.

[*Reported in 64 Vermont Reports 83.*]

THIS was a bill of interpleader and was heard upon the pleadings and a Master's report at the March term, 1891, Washington County. Munson, Chancellor, decreed, *pro forma*, that the orator be discharged upon payment of the fund into court, and that the fund belonged to Mrs. Robinson. The defendants Spaulding appeal.

The orator was the administrator of Mary A. Spaulding, and as such had collected \$472, which was the fund in question, upon a non-negotiable instrument payable to his intestate. This fund was claimed by the defendant, Mrs. Robinson, for the reason that Mrs. Spaulding had given the instrument to her in her lifetime, and by the other defendants as the heirs of Mrs. Spaulding, who claimed that, if the gift was ever made, it was void by reason of the mental incapacity of the donor.

All the defendants, except the Robinsons, joined in answer denying the gift, and setting forth that Mrs. Robinson was indebted to the

orator, and had put this instrument into his hands to collect with the understanding that whatever was realized should be applied on that indebtedness, wherefore this bill of interpleader would not lie.

The case was referred to a Master and a full hearing was had upon all the issues of fact involved. The Master found, among other things, that the orator received the instrument from Mrs. Robinson upon the understanding that he should apply whatever he collected upon her indebtedness.

J. A. Wing for the orator.

W. P. Dillingham and *E. A. Heath* for the Spauldings.

Wing and Fay for Mrs. Robinson.

The opinion of the court was delivered by

ROWELL, J. This is a bill of interpleader, brought to compel the defendants to interplead in respect of money collected by the **orator** on behalf of the defendant Mrs. Robinson on a non-negotiable obligation given to her mother, the intestate, by her brothers, Christopher C. Spaulding and Nathan R. Spaulding, who are defendants, and who claim that the money belongs to their mother's estate and not to Mrs. Robinson, who claims it by gift from her mother in her lifetime.

The bill does not allege that the orator has no interest in the money, nor was there annexed to it an affidavit that the orator was not in collusion with any of the defendants; but no demurrer was filed. Interpleader was not decreed, but the bill was answered, and all the defendants except Mrs. Robinson and her husband alleged interest in the orator and collusion by him with the Robinsons. The case was referred to a special Master to ascertain and report the facts on the issues raised by the answers, and on the coming in of the report the case was set down for hearing on bill, answers, and the Master's report, and a decree was entered that the orator pay the money into court and thereupon be discharged from further liability in respect thereof, with costs to be paid out of the fund, and that the fund belonged to Mrs. Robinson and be paid to her.

The Master finds that when the orator took said obligation from Mrs. Robinson to collect, she verbally turned it out to him to apply, when collected, on her indebtedness to him, and it is objected that the bill cannot be maintained because of such interest in the orator.

The remedy of interpleader is intended for the relief of those only who occupy the position of mere stakeholders and are in danger of being drawn into a controversy in which they have no concern. It is, therefore, of the essence of an interpleader suit that the orator should be entirely indifferent between the conflicting claims, having no inter-

est himself in the fund or other thing in dispute.¹ The attitude of the orator in such a bill is thus defined by Lord Chancellor Cottenham in *Hoggart v. Cutts*:² "The definition of interpleader is not, and cannot be, disputed. It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest and to which you, the defendants, set up conflicting claims. Pay me my costs and I will bring the money into court and you shall contest it between yourselves.' " His relation to the controversy must be such that on interpleader decree he can step out of the case altogether. When, therefore, the orator has a personal interest in the fund, his position is not one of indifference, and he cannot maintain his bill. And not only must he be disinterested when he brings his bill, but he must continue to be disinterested—his position must be one of "continuous impartiality."

But it is claimed that the objection of interest in the orator cannot be made now, but should have been made at an earlier stage of the case, before answer and trial on the merits. But in the absence of a decree of interpleader, we think the objection can be taken at the hearing. How it would be if such a decree had been made, we have no occasion to determine. In this connection it must be remembered that interest or want of interest is not mere formal matter, but goes to the very right of maintaining the bill.

In *Toulmin v. Reid*,³ Sir John Romily, Master of the Rolls, held that it is open to a defendant in an interpleader suit to show at the hearing that the case is not one proper for requiring the defendants to interplead, and that he is not precluded by not objecting by demurrer nor on motion to pay the money into court. He says that otherwise, assuming the case to be one not proper for a bill of interpleader, the orator would have nothing to do but to suppress part of the facts, or to misstate them in such a way that the bill would not be demurrable. It is true that the bill in that case was not dismissed, but it was because no one asked to have it dismissed. *Statham v. Hall*⁴ was a bill to compel the defendants to interplead in respect of a bond that had been deposited with the plaintiff for safe keeping. On the part of some of the defendants evidence was offered that plaintiff retained the bond under an indemnity from the other defendants. It was objected by the plaintiff that the evidence was not admissible, and in support of the objection it was argued that no evidence could be admitted on a bill of this description to affect the plaintiff, and the question of indemnity was not in issue between the parties. But the evidence was admitted as forming a material feature

¹ Story's Eq. Pl. s. 297; 3 Dan. Ch. Pr. & Pl. 1754.

² Cr. & Ph. 197.

³ 14 Beav. 499; s. c. 21 L. J. N. S. 391.

⁴ 1 Tur. & Rus. 30.

of the case, and the case was afterward argued on the merits and the bill dismissed with costs. In *Yates v. Tisdale*¹ the bill was answered, and instead of taking the usual course of practice applicable to bills of interpleader, replication were filed and proofs taken, and the case fully heard on the merits. The Vice-Chancellor held it allowable practice to object at the hearing to the propriety of filing the bill, and considered and adjudged that question. In *Mount Holly, etc., Turnpike Co. v. Ferree and others*² no demurrer was filed, and the answers were addressed solely to the question of right raised by the bill. No objection was made as to the propriety of the remedy. Evidence was taken, and the question elaborately discussed on its merits. On final hearing objection was first made to the form of the remedy. Supposing that the failure to file a demurrer and the acquiescence of the defendants had cured the difficulty and that the rights of all parties could be finally determined by the decree, the Chancellor prepared an opinion on the merits, holding the right to be clearly with the defendant Ferree, but on reflection he became satisfied that no final decree of that character could be made, and that it was not a case for interpleader at all, because the evidence afforded strong ground for presuming that there was collusion between the complainant and one of the defendants; and for that reason the bill was dismissed with costs.

We hold, therefore, that in the case before us the orator cannot maintain his bill because of his interest in the money in controversy.

No costs in this court will be allowed the defendants Robinson because they knew of the orator's interest but did not disclose it.

Decree reversed and cause remanded, with directions to dismiss the bill with costs in this court to all the defendants except the Robinsons. Costs in the court below to be determined by that court.

CRASS ET AL. *v.* MEMPHIS AND CHARLESTON RAIL-ROAD COMPANY.

IN THE SUPREME COURT OF ALABAMA, JULY 27, 1892.

[Reported in *11 Southern Reporter* 480.]

APPEAL from City Court of Decatur; W. H. SIMPSON, Judge.

Bill by the Memphis & Charleston Railroad Company against John F. Crass and others. From a decree ordering them to interplead, defendants appeal. Reversed.

R. A. McClellan and Kyle & Skeggs for appellants.

Humes & Sheffey for appellee.

COLEMAN, J. The bill was filed by the appellee to enforce a com-

¹ 3 Edw. Ch. 71.

² 17 N. J. Eq. 117.

mon carrier's lien upon certain property which had been transported by it, and which was then in its possession, and also to require the defendants (appellants) to interplead as to the ownership of the property. Certain causes of demurrer to the bill were overruled by the court, and, before answers were filed or decree *pro confesso* taken, the court decreed that the defendant should interplead. From this decree the appeal is prosecuted. The bill shows that the Bethlehem Iron Company, a corporation organized under the laws of Pennsylvania, shipped and consigned to the Decatur & Nashville Improvement Company, to be delivered at Decatur, Ala., a large quantity of rails, bolts, spikes, and fish-plates, particularly described in Exhibit A to the bill, and that, while said property was in the possession of the complainant as a common carrier, the Bethlehem Iron Company exercised the right of stoppage *in transitu*, on the ground that the Decatur & Nashville Improvement Company had become insolvent, and notified and demanded of complainant that the property should be delivered to the Bethlehem Iron Company. The bill then avers that John F. Crass sued out an attachment against the Decatur & Nashville Improvement Company, and claimed to have acquired a lien upon the property by the levy of the attachment, that the attachment suit was prosecuted to judgment, and, by virtue of a writ of *venditioni exponas*, the sheriff, after advertisement, sold the property, and John F. Crass became the purchaser, and as such claims the property. After stating in the bill that, at the sheriff's sale, the Bethlehem Iron Company gave notice of its claim to the property, it proceeds as follows: "The complainant avers that said writ of attachment never was in fact levied upon the property described in paragraph one of the bill and Exhibit A, herewith filed, and that said sheriff never did have possession, custody, or control of said property, nor did complainant ever surrender possession or release its control and custody of said property to any one." The bill set up a lien upon the property in favor of complainant for \$10,392.02, claimed "on account of unpaid freight charges and demurrage," and the prayer of the bill is that the decree for the delivery of the property to the proper owner be conditioned upon the payment of this sum to complainant, and, in default of its payment, that the lien be declared, and the property sold by a decree of the court for its payment. To entitle a party to the benefit of a bill of interpleader, he must negative any interest in himself in the matter in controversy, and show that he is a mere stakeholder; that there is a doubt to whom the debt is due or duly belongs, so that he cannot safely pay or render to the one without risk of being liable for the same debt or duty to the other. In such case the plaintiff only asks that he be at

liberty to pay the money to the party to whom it of right belongs, and may thereafter be protected against the claims of both.¹ As stated by Mr. Pomeroy, section 1325: "He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the thing in dispute or pay the debt. He cannot mingle up a demand of his own upon the property or thing with the demand that the other persons shall interplead. The interest, however, which will defeat the relief must be in the very *thing or fund* itself, which is the subject-matter of the controversy and of the suit. . . . Nor, it seems [he adds], will a charge, lien, or claim upon the very thing or fund itself, *which is admitted to be valid by both the defendants*," defeat the relief. Italics are ours. The complainant sets up a right to hold the property and a lien upon it for over \$10,000, cost and expenses for freight and demurrage. The bill does not show that the defendants assent to the correctness of this charge and claim; and the prayer of the bill is that the decree for the delivery of the property be conditioned upon its payment, and, if not paid, that the property be sold for the satisfaction of this lien.

It is contended, however, that this is a bill in the nature of a bill of interpleader, and that such a bill lies by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons. This rule is thus stated in 2 Daniell Ch. Pr. § 1571; Story Eq. Pl. § 291; and Mr. Pomeroy, *supra*; but the cases cited in support of the text, and the general principles declared by the text and authorities, do not authorize the application of the rule to cases like the present, where the complainant seeks to mingle up and enforce a demand of his own upon the property or thing, with the demand that the other persons shall interplead. There can be no bill of interpleader, or bill in the nature of a bill of interpleader, when the defendants contest and litigate with the plaintiff himself as to the validity and allowance of a claim set up by himself. Such a rule is at variance with the very nature and purpose of a bill of interpleader. Under such circumstances, the complainant has a personal interest in the result of the suit, directly antagonistic to that of respondents. We find a case cited in Lozier's *Ex'r's v. Van Saun*,² where "the complainant, who was a stakeholder, offered to pay into court the amount in his hands, deducting the duty and commission which he estimated at a sum certain. The right to this deduction was disputed, and therefore the Vice-Chancellor said there was a personal question between the complainant and one of the defend-

¹ 2 Daniell Ch. Pl. §§ 1561, 1571; 3 Pom. Eq. Jur. § 1320; Story Eq. Pl. § 291; Conley *v.* Alabama Gold Life Ins Co., 67 Ala. 475.

² 3 N. J. Eq. 325.

ants. He was not an indifferent stakeholder."¹ We need not go so far in the present case. The offer in the present case to deliver the property is made upon the condition that complainant's claim be admitted and paid, and in default that the property be sold. We make the further suggestion, if the property is sold by the decree of the court to satisfy the plaintiff's demand, and a stranger becomes the purchaser, as he may, of what avail is the bill as a bill of interpleader for the protection of the plaintiff? Nothing will have been accomplished by the respondents impleading each other.

The bill is objectionable as a bill of interpleader for another reason. It is the danger of injury to the complainant, from the doubtful rights and conflicting claims of the defendants to the fund, or to the thing or duty to be performed, which authorize him to call upon the claimants to interplead. The bill must show he cannot safely pay or render the duty without risk of being subsequently made liable again. When, from complainant's own showing, there can be no doubt in the case, the party entitled to the debt or duty claimed is not to be subjected to the delay and expense of a chancery suit.² The case made by the averments of the bill show that there was no levy on the property under the attachment suit of John F. Crass, and the sale by the sheriff carried no title or claim to the purchaser. "To constitute a levy on personal property, the officer must assume dominion over it. He must not only have a view of the property, but he must assert his title to it by such acts as would render him chargeable as a trespasser but for the protection of the process."³ Every fact necessary to constitute a valid levy is negatived by the averments of the bill. If the defendants should answer admitting the allegations to be true in every respect, a case is made out which clearly shows that the Bethlehem Iron Company, subject to complainant's lien, is entitled to the property, and that John F. Crass has no standing in court. It becomes necessary for him to dispute the allegations of the bill in regard to the basis of his title, before he can show such a claim as will give him any standing in court and right to interplead. The rule is that if complainant "states a case in his bill which shows that one defendant is entitled to the debt, and the other is not, both defendants may demur."⁴

It is contended by appellant that the statute (section 1182, Code)⁵

¹ *Mitchell v. Hayne*, 2 Sim. & S. 63.

² *Railroad Co. v. Clute*, 4 Paige 392.

³ *Abrams v. Johnson*, 65 Ala. 468, and authorities cited.

⁴ *Briant v. Reed*, 14 N. J. Eq. 276; *Blair v. Porter*, 13 N. J. Eq. 267; *Story Eq. Pl.* § 292; 2 *Story Eq. Jur.* § 821.

⁵ This section provides for the sale of freight to pay charges.

afforded complainant a cheap and adequate remedy at law to enforce his common carrier's lien, and for this reason the bill is without equity, and should be dismissed. If complainant had an equitable remedy prior to the passage of the statute, the remedy remains unaffected by the statute. The rule which prevails in this State is that declared by Mr. Pomeroy, and is as follows: "Although a statute may confer a remedy for the enforcement of a right in a court of law, unless the statute contain negative words or other language expressly taking away a pre-existing equitable jurisdiction, or by its reasonable construction and its operation, show a clear legislative intent to abolish that jurisdiction, the equitable jurisdiction remains unabridged."¹ A common carrier undoubtedly is entitled to a lien for freight upon the goods carried, and the right to retain possession of them until his reasonable charges are paid.² The lien exists independent of any remedy given by statute for its enforcement, and we do not doubt that a court of chancery has jurisdiction to enforce it.³ As a bill of interpleader, or bill in the nature of a bill of interpleader in its present shape, it is objectionable and a subject to demurrer. We do not say it cannot be amended, so as to give it equity as a bill in the nature of a bill of interpleader. The right of stoppage *in transitu* is a valuable right, and may have been properly exercised in this case. If the buyer of goods is insolvent at the time of the purchase, and his insolvency is not known to the vendor at the time of the sale, or become insolvent after his purchase, the vendor has the right of stoppage, while they are in the hands of a carrier, in transit, or in store at the end of the journey, no actual delivery having been made to the purchaser, and no intervening rights having attached. The rule arises upon the insolvency of the buyer, and is based upon the principle of justice and equity that one man's goods shall not be applied to another man's debts, and is said to be an equitable extension of the vendor's common-law lien and right to retain the goods until they are paid for.⁴ The exercise of the right of stoppage does not displace the carrier's lien. He may still retain possession until his freight charges and expenses are paid.⁵ We do not know but that respondents have admitted the correctness of complainant's demand and the extent of his lien for freight and charges, and the bill

¹ 1 Pom. Eq. Jur. § 279.

² 2 Wait. Act. & Def., p. 60, § 2; Story, Bailm. § 588; Long *v.* Railroad Co., 51 Ala. 512.

³ Westmoreland *v.* Foster, 60 Ala. 453; 2 Kent Comm. § 642.

⁴ 2 Benj. Sales, §§ 1229-1231; Farrell *v.* Railroad Co., 102 N. C. 390; 9 S. E. Rep. 302; Loeb *v.* Peters, 63 Ala. 248.

⁵ Pennsylvania R. Co. *v.* American Oil Works, 126 Pa. St. 485; 17 Atl. Rep. 671.

may be amended in this respect. The bill may be further amended so as to show that respondent Crass has such a claim to the property the subject-matter of controversy as to entitle complainant to require him and the other respondents to interplead. We do not know the facts of the case, and cannot anticipate the action of complainant in this respect. He is entitled to the opportunity to amend his bill if he can.

The court erred in its order requiring the respondents to interplead, without granting leave to file answers. The mere allegations of a bill, however strong, do not authorize a decree that the parties interplead. They may deny in their answers, and sustain by proof their denial, every averment upon which the bill rests for relief as a bill of interpleader. When the answer denies the facts upon which the bill depends as a bill of interpleader, the plaintiff is put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead. A bill of interpleader should be sworn to, but the omission of an affidavit is an amendable defect. There is no cause of demurrer assigned by defendants which raises the question of a carrier's lien for demurrage, and the question is not decided.¹

Reversed and remanded.

WALKER, J., not sitting.

¹ See *Hawgood v. 1310 Tons of Coal*, 21 Fed. Rep. 681.

CHAPTER IV.

BILLS *QUIA TIMET* AND TO REMOVE CLOUD ON TITLE.

HAMILTON *v.* CUMMINGS.

IN THE COURT OF CHANCERY OF NEW YORK, SEPTEMBER 27, 1815.

[Reported in 1 *Johnson's Chancery Reports* 517.]

THE bill stated that the defendant pretending to be lawfully possessed of a bond, made by James Hainilton, the father of the plaintiff, dated the 27th of September, 1794, conditioned for the payment of £60, had brought an action, at law, thereon against the plaintiff, as administrator of his father's estate, and the cause was at issue. That the defendant pretended to have another bond, executed by the plaintiff's father, for £800, which he refused to show. The plaintiff charged that both the bonds, if executed, were voluntary, and without consideration, or were given to indemnify the defendant for being bail in certain suits brought against him, and were to be given up and cancelled, if the defendant was not damned; that the suits were all settled, and the defendant had been put to no cost or damage. The plaintiff set forth various facts relative to the bonds and the situation of the defendant, which are not material to state here; and that the defendant was indebted to his father's estate; and prayed that the defendant might pay the sums he owed, and an account, etc., and for a perpetual injunction against any proceedings on the bonds; and that they might be delivered up and cancelled, etc., and for general relief, etc.

The defendant, in his answer, admitted that he held the bond of the plaintiff's father for £60, and had commenced a suit thereon, etc. That the plaintiff's father, on the 22d of September, 1788, executed a bond to him, conditioned to pay £996, on the first of January following, which he set forth; that it was given on a special trust, of a secret and delicate nature, and was to be put in force on certain contingencies, which had not happened; yet, it being possible that they might happen, he thought it his duty to keep the bond in his possession; that he paid no consideration for the last-mentioned

bond, and had no personal interest therein ; and denied that he ever threatened to put it in suit; that the trust of this bond has no relation to the suit between the defendant and plaintiff ; and that the defendant is advised that it would be improper further to disclose it, and prayed the direction of the court therein. The defendant denied that he had, or pretended to have, any other bonds of the intestate, and if there were any they were paid. He denied that the bond for £60 was voluntary, or given for indemnity for being bail for the obligor ; that he never was, to his best recollection, bail for the obligor ; but that the bond was given for a debt justly due on settlement of accounts, and was still due. And he denied that he owed the intestate anything, etc.

The cause being put at issue, several witnesses were examined on the part of the plaintiff, whose testimony related principally to certain papers in the plaintiff's possession, showing that the bond for £60 was given by way of indemnity merely, and that the defendant had sustained no damage.

Witnesses were, also, examined on the part of the defendant, whose testimony related chiefly to the good character of the defendant, his situation, business, and connection with the plaintiff's father, etc.

The rule for publication was passed, and the cause set down for a hearing, by consent, on written briefs or arguments, submitted to the court with the pleadings and proofs.

I. Hamilton, in person.

Burr for the defendant.

The CHANCELLOR. Upon the answer and proofs in this cause, the relief sought and claimed is, that the two bonds acknowledged to be held by the defendant, should be decreed to be delivered up and cancelled. The question, whether such a remedy can, or ought to be applied, leads to an interesting inquiry.

1. The defendant admits, that he holds a bond, executed by the ancestor of the plaintiff, on the 22d of September, 1788, for the payment of £996 on the first of January following; and that it was given upon a special trust, of a secret and delicate nature, which he does not think proper to disclose ; and that it was to be in force only upon certain contingencies which have not yet happened, and, probably, never will ; and that he paid no money or other consideration for it, and has no personal interest in it, nor has ever pretended to put it in suit. After such a confession, it would be very unreasonable that the bond should be suffered to continue a dead weight upon the property that may have descended to the plaintiff. It is, however, not easy to extract from the books any precise rule by which the jurisdiction of the court is, in such cases, to be exercised. The bond, most prob-

ably, could not be enforced at law, though it appears on the face of it to be an absolute bond for the payment of money. The lapse of 27 years, if not most satisfactorily accounted for, would form of itself a conclusive bar to a recovery; and the admissions in the answer must destroy its validity here, even if they cannot be received as a defense at law. Why, then, should it any longer exist to cast even a shade over the title to the assets of the ancestor?

I have looked into the cases on the point of jurisdiction, and I have no doubt that the court has competent power to order the bond to be cancelled; and the power is the more necessary since there is no such jurisdiction at law.

In *Minshaw v. Jordan*,¹ a bill was filed to have a promissory note delivered up and cancelled, as obtained by fraud, and without consideration. The Master of the Rolls retained the bill, and allowed the defendant to proceed at law upon the note; and the verdict being found against it, he then decreed that the note be delivered up to the plaintiff to be cancelled. But, afterward, in *Ryan v. Macmath*,² Lord Thurlow would not direct a note to be delivered up, though a recovery had been unsuccessfully attempted at law; and he would not admit the rule in this general extent, that whenever one party had an instrument on which he could not maintain an action at law, he must be decreed to give it up, and he accordingly dismissed the bill, but without costs. Sir Samuel Romilly, in citing this case, in 13 Ves. 584, observed, that the decision was disapproved of, at the time, as the note was void, not upon the face of it, but from collateral circumstances; and in *Newman v. Milner*,³ notwithstanding this case of *Ryan v. Mackmath* was mentioned, Lord Loughborough ordered a bill of exchange, avowedly given by one partner in the name of the firm, for his private debt, to be delivered up, with costs, without even waiting to have its validity tried at law; and he did it on the ground, that the evidence was clear and decisive against the bill, and that the payee took it, knowing it to be for a private debt, and that there was no need of a verdict to satisfy the conscience of the court. But the subsequent cases of *Franco v. Bolton*⁴ and of *Gray v. Mathias*,⁵ are calculated to throw doubt once more on the exercise of this power. In the first of those cases, a bond was alleged to have been given for an illegal consideration, and the obligee had obtained a verdict at law. The bill was to have the bond delivered up; but it was, on demurrer, dismissed by Lord Loughborough, on the ground, that there was no necessity for the interposition of the court, as the matter could have been pleaded, and the bond rendered null, at law. In the

¹ 3 Bro. 18 n.

² 3 Bro. 15.

³ 2 Ves. jun. 483.

⁴ 3 Ves. 368.

⁵ 5 Ves. 286.

other case, the bond was void on its face, as appearing to have been given *pro turpi causa*, but the court of exchequer refused a decree to deliver it up, and principally on the ground of the length and expense of such a remedy in equity, when the defense at law was irrefragable. The Ch. Baron observed, with some sensibility, that though equity might have a concurrent jurisdiction, it was not fitting, in that particular case, to exercise it, as the plaintiff had a full defense at law; and it was oppressive to seek, by a long and costly litigation in chancery, to have the bond delivered up, when, by the plaintiff's own showing, it was a mere nullity. In that case the bond had never been sued at law, and the bill was dismissed, with costs.

The equity power was afterward asserted by Lord Eldon, in Bromley *v.* Holland,¹ and he dwelt much on the question of jurisdiction, and did not concur in the decision in Franco *v.* Bolton. He seemed to think the question had become settled, by a series of decisions, in favor of the authority of the court to direct instruments to be delivered up, though they might be void at law. He admitted there was some degree of contradiction in the cases, but he inclined in favor of the jurisdiction, even if the question had been *res integra*; and though he could not say, if it was clear that no use could be made of the instrument, that was ground enough for the equitable jurisdiction, yet "it was not unwholesome that an instrument should be delivered up upon which a demand may be vexatiously made as often as the purpose of vexation may urge the party to make it." In Jackman *v.* Mitchell,² the equity jurisdiction was again freely exercised. The bond there was given to secure one creditor the deficiency of a composition, and was never communicated to the other creditors, and had never been put in suit. The bill charged the bond to have been thus taken against the policy of the law, and in fraud of creditors; and the counsel, for the defendant, when speaking of the jurisdiction, observed, that if an instrument was void upon its face, the court would not assume jurisdiction and cancel it, because it was void at law; and that "there was no instance of a decree for delivering up a bond, appearing upon the face of it to be void." Lord Eldon expressly waived any opinion on that distinction as to jurisdiction, but said that the bond was bad, because it was proved, *aliunde*, that it was intended to be kept secret; and he accordingly decreed, that it be delivered up, and awarded costs against the defendant.

I am inclined to think, that the weight of authority, and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is, or is not, void at law, and whether it be

¹ 7 Ves. 3.

² 13 Ves. 581.

void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded. It is every day's practice, as the counsel observed, in French *v.* Connelly,¹ to order instruments to be delivered up, of which a bad use might be attempted to be made at law, *although they could not even there entitle the holders to recover.* It is, indeed, not very apparent, why a doubt could have been started in some of these modern cases as to the general jurisdiction of the court, when we consider the uniform tenor and language of the more ancient decisions, and which do not appear to have turned upon the distinction, whether the instruments were, or were not, void at law. In Whittingham *v.* Thornburgh,² and Goddard *v.* Garrett,³ and De Costa *v.* Scandrel,⁴ policies of insurance, procured by fraud, were ordered to be delivered up and cancelled, though the fraud was equally a defense at law. And, in another case,⁵ Lord Talbot ordered a bond to be cancelled, and charged the defendant with costs, without deciding whether, or not, it was good at law. But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction. It may, sometimes, become essential to the perfect and tranquil enjoyment of private right, that this most important branch of equity power should be exercised in the one case as well as in the other; and it may be here observed, that, in the case of Law *v.* Law, the whole consideration was spread out upon the bond, and that, as the case is reported in Peere Williams, the Lord Chancellor was inclined to consider the bond as void at law as well as in equity, and yet he cancelled the bond without sending the parties to law. The learned counsel, therefore, in Jackman *v.* Mitchell, appear to me to have hazarded too much in their assertion that there was no such case to be found.

¹ 2 Anst. 454.

² 2 Vern. 206.

³ Ibid. 269.

⁴ 2 P. Wms. 170.

⁵ Law *v.* Law, Cases temp. Talbot 140. 3 P. Wms. 391.

The bond now in question comes within that case, for it is good on its face, and void only from the facts disclosed by the defendant's answer. We can, consistently with the whole current of authority, direct it to be cancelled. It is the more proper to do so, because it is, at least, doubtful, whether the pretended secret trust, under which it was taken, and the failure of that trust, would be received as a defense at law. My impression is, that it could not. But, in this court, the evidence furnished by the answer is decisive. The defendant holds a bond for 27 years, and says it was given upon a trust which he ought not to disclose, and depends upon a contingency which has never happened, and which he says is only within the reach of possibility. Such a bond cannot be permitted to endure forever, and we cannot recognize any trust which is not disclosed, and is, therefore, unknown. It is not convenient, or just, that such a bond should continue, with a pretension to the assets in the hands of the plaintiff. It might embarrass their application, or weaken their security, or poison their enjoyment. It is immoral for a person to retain a bond which is useless to him, and an annoyance to others.

This bond must, therefore, be delivered up, and cancelled.

2. The other bond, conditioned for the payment of £60, and on which a suit is pending at law, is shown, by the proof, to be no longer valid. It bears date on the 27th day of September, 1794, and is made payable on the 29th of the same month; and the answer of the defendant avers that it was given for a debt justly due on a settlement of accounts; and denies that it was given to indemnify the defendant for becoming bail in any suit whatever; and that the defendant was never bail in any suit for the obligor. The answer further states, that one of the witnesses to the bond is dead, and that William Hill, the other witness, is living, and is a man of good repute. This cause was put at issue, and witnesses examined on each side, and publication passed by consent. In the course of examination the plaintiff proves, by this same witness, that he was present at the execution of the bond; and that he, with the other witness (now dead), at the same time, attested a receipt given by the defendant to the obligor, showing that the bond was given by way of indemnity to the defendant for becoming bail for the obligor. The receipt is made an exhibit in the cause, and proved by this witness; and it is of the same date with the bond, and declares that the bond, which it duly specifies, was given as an indemnity to the defendant for being surety for the obligor, in a suit brought against him by one Samuel Wood; and that if the suit was settled and discharged in due time, without any further damage, the bond was to be void. No damage is pretended to have been sustained. The defendant denies that he ever was bail for the

obligor. As the receipt goes to contradict the express terms of the bond, and is not under seal, I apprehend it would not be admitted, at law, as a defense against the payment of the bond ; and as it forms a matter of defense *dehors* the bond, and is good in equity, it brings the case within the reach of all the decisions in favor of the exercise of the jurisdiction of this court ; and it becomes essential to justice that the court should interfere and protect the plaintiff from the claim set up at law.

I have not deemed it regular to take notice of the suggestion of the counsel for the defendant, accompanying his brief (for the case was, by mutual arrangement and consent, argued on paper), of a defect in the interrogatories on the part of the plaintiff, and of the delay of his solicitor to produce the exhibit. There is no motion before me on the subject, nor would it have been in season if it had been made ; for even before the last term, publication passed by a rule entered by consent, and the cause was, by the like consent, set down for hearing at the last term. I shall, accordingly, decree, that both the bonds be delivered up to the register, or assistant register, and cancelled within twenty days after notice of this decree ; and that the defendant be perpetually enjoined from prosecuting either of the said bonds at law; and that the defendant pay the costs which have accrued in the suit at law, and, also, the costs of this suit.

Decree accordingly.

SIMPSON v. LORD HOWDEN. V

IN THE HIGH COURT OF CHANCERY, BEFORE LORD COTTEHAM,
C., JUNE 17, 23, AND AUGUST 30, 1837.

[Reported in 3 Mylne & Craig's Reports 97.]

THE Master of the Rolls having overruled a general demurrer to the bill, the defendant (Lord Howden) now appealed.

The allegations of the bill are stated in the first volume of Mr. Keen's Reports.¹ The first sentence of the witnessing part of the agreement in question should, in conformity with the allegation in the bill, have been stated thus : viz., "It was witnessed that Lord Howden thereby agreed that, on condition of the stipulations and agreements thereinafter contained being observed and performed, he did thereby withdraw his opposition to the bill, and give his assent thereto."

¹ Page 583.

The prayer of the bill was, that it might be declared that the agreement was against public policy, and void in law; and that it might be delivered up to be cancelled; and that the defendant might, in the meantime, be restrained from further proceeding at law, to enforce payment of the sum of £5,000 before mentioned; and that, if it should, for any reason, appear that the agreement was consistent with public policy, and that the same therefore was not void, and ought not to be delivered up, then it might be declared that, according to the true intent and meaning of the agreement, the sum of £5,000 did not become payable to the defendant, except upon such portion of the lands as was described in the maps and plans deposited for the purposes of the act, or some part of the same, being taken and used by the railway company, and by way of additional compensation above the purchase-money to be paid to the defendant for the damage which his lands would thereby sustain; or that it might be declared that the condition and stipulation contained in the agreement for the payment of the sum of £5,000, upon any other construction thereof, was improperly acquired and obtained from the plaintiffs; and that the defendant might be thereupon restrained from proceeding at law for the payment of the sum of £5,000 until some part of his lands described in the before-mentioned maps and plans should have been taken and used by the company.

The general line of argument taken in the court below was also adopted on the appeal; but it was further contended, in support of the demurrer, that there was no jurisdiction in equity to order an instrument to be delivered up upon the ground of its illegality, if such illegality appeared on the face of the instrument itself.

The Solicitor-General, *Mr. Koe*, and *Mr. Bethell* in support of the demurrer.

Sir C. Wetherell, *Mr. Wigram*, and *Mr. Wilbraham* in support of the bill.

The LORD CHANCELLOR. This was an appeal from an order of the Master of the Rolls, overruling a demurrer; the case, therefore, must depend altogether upon the statements in the bill. The bill states the formation of a company, in the year 1835, for the purpose of making a railway, to be called "The York and North Midland Railway Company," to which the plaintiffs were subscribers; that the proposed railway, as described in the plans deposited according to the regulations of Parliament, passed through part of the defendant's lands; that afterwards, and when it was too late to alter the line, the defendant expressed his dissent, and subsequently petitioned the House of Commons against the bill; and that thereupon an agreement was entered into between the defendant and the plaintiffs, in their

individual capacity, dated the 4th of May, 1836, whereby they agreed, in consideration of his assenting to the bill, that they would endeavor, in the next session, to obtain an act to deviate the proposed line, and to adopt another line; and, within six months after the passing of the act, pay him £5,000 towards compensation for damage by the deviated line; and if they should not succeed, in the following session, in getting an act for the deviated line, then to pay so much more, for additional compensation for the original line, as certain referees should award; and should pay £100 per acre for all land taken for the purposes of the railway. The bill then states that the act passed, and that it was provided that the powers of taking land for the purposes of the act should cease, if not exercised within two years. It then states that, after the passing of the bill, and before the company had taken any part of Lord Howden's land, a new and better line was suggested to them, avoiding all Lord Howden's land; and that they had presented a petition to Parliament, to enable them to adopt this amended line. The bill then alleges that the agreement was against public policy and illegal, and that it was not intended that the £5,000 should be paid, unless some damage was sustained; but that Lord Howden, nevertheless, had brought an action for the £5,000; and prays that the agreement may be cancelled, or that it may be declared that the £5,000 was not payable unless the land were taken; and for an injunction to restrain Lord Howden from proceeding in the action.

To this bill a general demurrer was put in; and in support of it the argument was, first, that the contract was not void, as being illegal or against public policy, and that there was therefore no ground for interfering with the obligation imposed by it; or, secondly, if it be impeachable, yet, as the grounds of objection to it appear upon the face of the contract itself, and might therefore be taken advantage of at law, equity ought not to interfere.

The Master of the Rolls, as I am informed, decided the case, and overruled the demurrer, upon the first point, not particularly alluding to the second.

To form an opinion upon the first point, it is necessary to analyze the contract. It is an agreement, in the event of the bill then contemplated passing, and the railroad thereby authorized being made, to pay to Lord Howden a certain sum, as compensation for the damage his property might thereby sustain. To make such arrangements before similar bills are proposed to Parliament is much in the usual course, and is, in fact, the ground of many of the assents given to the passing of such bills. In that there is not anything illegal; and the case was not put upon this ground.

Then, as to the bill proposed to be introduced as a substitute for that first intended to be passed, namely, the bill for the varied line, the case is much the same. That, too, was an agreement for the damage which in such case Lord Howden might sustain, and in that, taken by itself, there would not be anything illegal. The illegality, however, is said to consist, not in providing for each of these alternatives, but in the provision that the projectors of the first line, and those who were to advocate the bill for carrying it into effect, should use their best endeavors to procure an act for another line, and so to defeat the plan proposed by the bill which they were seeking to have passed into a law. Having in contemplation an alteration in the line, it cannot be supposed that the company would interfere with the lands in the original line; but the expectation that the original line would be followed, might, undoubtedly, operate upon the plans of individuals dealing with their lands in that line, as the apparent certainty that their lands would not be affected by the proposed railway might operate upon the plans of individuals in the neighborhood dealing with their lands, and, amongst others, of those having lands in the deviated line. If, however, the contract grounded upon the deviated line had not been entered into until after the first act had passed, the same inconvenience might have arisen to individuals, and yet no one could have supposed that such a contract, made at that time, would have been illegal. The illegality must, therefore, consist in this, that it operates as an inducement to persons applying to Parliament for certain powers, not to use such powers, but to endeavor to substitute others for them, by a new act, at a subsequent period. Is it, in short, contrary to public policy, and therefore illegal, that persons should apply to Parliament for a certain object, and for certain powers to carry that object into effect, intending, at a future period, to apply for other powers to effect the same object? But as, from the opinion I have formed upon the other point, this question will most probably come on for decision in another court, I abstain from pursuing it any further.

The second objection to the bill is, that the illegality, if any, appearing upon the face of the contract, is cognizable at law, and that equity, therefore, ought not to interfere. This must depend upon authority; it being alleged, for the defendant, that there was no instance of a court of equity having entertained jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality, which appeared upon the face of it; and in which case, therefore, there was no danger that the lapse of time might deprive the party to be charged upon it of the means of defense.

In *Colman v. Sarrel*,¹ a case is referred to, in the argument, as having been then recently decided by Lord Thurlow, in which he is stated to have held, that, where an instrument cannot be proceeded upon at law, there is no ground to come into equity for relief; and in the case of *Colman v. Sarrel* itself, his lordship dismissed the original bill, seeking to have a deed delivered up, although, upon a cross bill seeking a performance of its provisions, he gave the parties an opportunity of trying the question of illegal consideration at law. In *Franco v. Bolton*,² Lord Thurlow allowed a demurrer to a bill to set aside a bond, alleged to have been given *pro turpi causâ*, after a verdict for the obligee, although the illegality of the consideration did not appear upon the face of the bond. In *Gray v. Mathias*,³ a bill was filed to set aside a bond which appeared, upon the face of it, to have been given *pro turpi causâ*. The question of jurisdiction upon that ground was argued; and Chief Baron Macdonald, with the assent of the three other barons, dismissed the bill with costs, not professing to decide upon the question of jurisdiction, but, what amounts to the same thing, that in such a case a court of equity ought not to interfere; stating that the plaintiff himself alleged that the instrument was a piece of waste paper, and was good for nothing, upon the face of it; that, whenever it was produced, it would appear to be good for nothing, the plaintiff himself alleging that he had an irrefragable defence against it. This is a very distinct authority against the jurisdiction contended for by the plaintiffs. The cases upon the Annuity Acts, *Byne v. Vivian*,⁴ *Byne v. Potter*,⁵ and *Bromley v. Holland*,⁶ all in the fifth volume of *Vesey*, and the latter case reported, upon appeal, in the seventh volume of *Vesey*,⁷ do not appear to me to be applicable to the present case; for in none of them did the circumstance which created the invalidity of the transaction appear upon the face of the deeds, and in none of them were the objections confined to defects in the memorial, but depended upon evidence dehors, such as the mode of paying the consideration, of which the evidence might, at a future time, be lost. In the latter of these cases, *Bronley v. Holland*, Lord Alvanley expressed great doubt as to the jurisdiction, but thought himself bound by the prior decision of *Byne v. Vivian*. When the same case came before Lord Eldon,⁸ he expressed a similar opinion as to the jurisdiction, but supported it, in that case, upon the preceding authorities, and by suggesting⁹ that, by destroy-

¹ 1 Ves. jun. 50.

² 3 Ves. jun. 368.

³ 5 Ves. jun. 286.

⁴ 5 Ves. 604.

⁵ Ibid. 609.

⁶ Ibid. 610.

⁷ Page 3.

⁸ See 7 Ves. 16.

⁹ Page 20.

ing the deed and giving evidence of its contents, the variance between the deed and the memorial might no longer appear. He also refers the jurisdiction to deliver up bills and notes to a similar ground, viz., that the evidence might be lost; and observes,¹ "There is considerable difference between the case of a bill of exchange upon which, on the face of it, there can be no demand, and an instrument which, upon the face of it, purports to affect real property; and that is to be applied in some measure to the case of a bill without a stamp"; and he again says, "I do not go the length that, if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party who can make no use of it beneficial to himself."² In *Jervis v. White*,³ upon a motion by one partner to have a bill delivered up which had been accepted by the other partner in the name of the partnership, there are some observations of Lord Eldon which have been supposed to favor the jurisdiction contended for; but they must be taken with reference to the subject he was discussing, and the circumstances of the case, which, as stated in the sixth volume of Vesey,⁴ exhibit a case of gross fraud in the formation of the partnership, and, therefore, in the origin of the legal obligation against which protection was sought by the bill. In that case, there could be no doubt, upon that statement, as to the jurisdiction of this court. So, in *Ware v. Horwood*,⁵ the facts, as stated in the tenth volume of Vesey,⁶ amounted to gross fraud in the origin of the transaction.

Of the general jurisdiction of this court, therefore, there could be no doubt; and Lord Eldon, in adverting to the general question of jurisdiction, is so far from asserting it as was contended for by the plaintiffs, that he refers it to cases in which the legal question arises incidentally, or in which "the variety and multiplicity of the suits that might be brought at law and in equity furnish some principle in equity, of which the court will take advantage for the purpose of deciding, once for all, whether the securities be valid or not."⁷ In *Hayward v. Dimsdale*,⁸ the deed was impeached, upon the ground of oppression, and because it was executed in contemplation of bankruptcy, and that the sum stated in it was not what was supposed to be due, but a sum supposed to be fully equal to the debt, and therefore inserted as a security. No illegality appeared upon the face of the deed, and many of the grounds upon which it was impeached were purely equitable. The demurrer, therefore, was necessarily bad, and the case has no application to the present. It is to be ob-

¹ Page 21.

² See page 22.

³ 7 Ves. 413.

⁴ Page 738.

⁵ 14 Ves. 28; see pp. 32, 33.

⁶ Page 209.

⁷ 14 Ves. 33.

⁸ 17 Ves. 111.

served, as to one class of cases generally referred to upon this subject, viz., bills to set aside annuities, that they not only depend upon facts not appearing upon the face of the instrument, but that, except in those cases in which the statute gives authority to set aside the instrument, law affords a very inadequate remedy; for, first, the annuitant may repeat his action as often as the annuity becomes payable, and if the invalidity of the annuity be fully established, still the consideration money would remain in hands which ought not to retain it; and by the mode in which courts of equity deal with the payments on account of the annuity as against the consideration paid for it, an account is raised which a court of equity alone can properly take. It is not a mere declaration of the illegality of the instrument, but it involves the duty of restoring the parties, as nearly as possible, to their original situation, which a court of equity alone can effect. So, the cases upon policies of insurance always represent transactions, which, if true, would afford a defence to an action, yet, as proceeding from misrepresentation or fraudulent suppression, clearly give jurisdiction to courts of equity; and, in these cases also, the return of the premium would be to be arranged, if such cases were ever brought to a hearing, of which, however, there are very few precedents. In *Jackman v. Mitchell*,¹ Sir S. Romilly stated that there was no case of a decree for delivering up a bond appearing upon the face of it to be void, and referred to the case of *Ryan v. Mackmath*.² Lord Eldon did not controvert that proposition, but said that the proposition did not arise, the instrument not being bad upon the face of it, but bad only as it might be proved to be so *aliunde*. In *Harrington v. Du Chastel*, referred to by Lord Eldon in *Bromley v. Holland*,³ and reported in a note in the second volume of Mr. Swanston's Reports,⁴ the illegality did not appear upon the face of the bond, and the corrupt contract was not between the obligor and obligee; and, upon the motion for the injunction, the Lord Chancellor expressed doubts whether a court of law could relieve. In *Law v. Law*,⁵ the Lord Chancellor says, "It is agreed on all hands that this bond is good at law; wherefore the representative of the obligor is obliged to come hither for relief."

If, then, there be no case in which this jurisdiction has been exercised, and if I find Lord Thurlow, in the case referred to in *Colman v. Sarrel*, and the Court of Exchequer in *Gray v. Mathias*, deciding against it; Lord Alvanley, in *Bromley v. Holland*, regretting that the jurisdiction had been assumed in the cases of annuities; and Lord Eldon, in the same case, directly, and in *Ware v. Horwood* inferen-

¹ 13 Ves. 581; see p. 585.

³ 7 Ves. 3; see p. 19.

⁴ Page 158, n.

² 3 Bro. C. C. 15.

⁵ Cas. tem. Tal. 140.

tially, disclaiming the jurisdiction contended for ; it only remains to be considered, whether any such cogent reason exists in the present case, as to make it my duty to assume the jurisdiction, and so, for the first time, to establish a precedent for it.

Now, I find no fact stated in this bill impeaching the legality of the instrument, beyond what appears upon the face of the instrument. If there should be a decree for the plaintiffs, it would be merely to deliver it up—no consequential relief, no account to be taken, no provision for restoring the parties to their original position. Whether the defendant proceed in the action he has brought, or bring another, the same questions must be raised and decided at law as are raised in the bill. Why should a court of equity, in this case, assume to itself the decision of a mere legal question, contrary to its usual practice? Would it do so if a bill were filed to have a note or bill delivered up drawn upon unstamped paper, or upon a wrong stamp? But what would be the consequence of retaining such a bill? Unless an injunction were granted, the action would proceed. If the plaintiff at law were to recover, it can hardly be supposed that this court would restrain execution, upon its own opinion of a point of law, after a court of law had decided it in favor of the demand. That a party has not effectually availed himself of a defence at law, or that a court of law has erroneously decided a point of pure law, is no ground for equitable interference ; and if the defendants at law obtain a verdict, and the illegality of the instrument be thereby established, the whole object of the plaintiffs in equity will be obtained. Is it, then, a case in which a court of equity will, by injunction, restrain further proceedings in the action, and take to itself the exclusive jurisdiction over this legal question? I apprehend not ; for not only will the court wish, in some way, to obtain the opinion of a court of law upon a purely legal question, but, by permitting the action to proceed, it will afford to the parties the most speedy, cheap, and satisfactory means of deciding the question between them.

As to the points raised by the bill, whether, in the events which have happened, the plaintiffs in equity are liable to pay the £5,000, it is purely a question of construction, which may be dealt with at law quite as well as in equity, and which, therefore, cannot affect the question of jurisdiction.

In the absence, therefore, of any decision in favor of the jurisdiction contended for by the plaintiffs, and with the authorities against it to which I have referred, and seeing no benefit which can arise, in this or any other such case, from this court assuming the jurisdiction, I am of opinion that the demurrer ought to be allowed.

SCOTT v. ONDERDONK AND ANOTHER.

V

IN THE COURT OF APPEALS OF NEW YORK, JUNE TERM, 1856.

[Reported in 14 New York Reports 9.]

APPEAL from a judgment of the Supreme Court affirming a judgment of the City Court of Brooklyn in favor of the plaintiff on a demurrer to the complaint. The action was brought in March, 1852, against Onderdonk and the city of Brooklyn. The complaint stated that the plaintiff was the owner of two lots of land situate in the city of Brooklyn; that in November, 1848, the city sold the lots at auction to pay an alleged assessment thereon for constructing a well and pump in one of the streets, and that Onderdonk became the purchaser for the term of a thousand years at the price of \$23.28; and that the common council of the city executed and delivered to him a certificate of the sale. This certificate was set out in the complaint. It recited the making of the assessment, the proceedings to collect the same, and the advertisement and sale of the lots to Onderdonk, and certified that at the expiration of two years from the sale he would be entitled to a conveyance of the premises for the term for which they were sold. The complaint stated that a copy of the certificate was in March, 1849, filed in the clerk's office of Kings County, and entered in a book kept by the clerk where certificates of sales of land for taxes were entered; and then alleged "that no such assessment or tax as was mentioned in the certificate had ever been made and confirmed; that the proceedings had and taken by the city and its officers in respect to laying and imposing the assessment, the confirmation thereof and sale were irregular, illegal, defective, and void; that the resolutions of the common council passed in respect to the assessment and sale were not presented to the mayor for his approval, and that the mayor did not approve thereof as required by the statute." It was further stated in the complaint that Onderdonk claimed that by virtue of the certificate he was entitled to receive from the city a lease of the premises for the period mentioned therein, but that as yet no lease had been executed to him; that as the plaintiff was advised the certificate by reason of the filing and entry of a copy thereof in the clerk's office was presumptively a lien upon the premises or showed presumptively a power in some one other than the plaintiff to create an estate therein, whereas in fact no such power or lien existed, and the certificate was a cloud upon his title, diminishing the value of the property and preventing its sale. It was averred that the defendant Onderdonk, on request to do so, had refused to cancel the certificate or release his pretended rights under it. The defendant

Onderdonk appeared and demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The City Court overruled the demurrer and gave judgment for the plaintiff, setting aside the certificate of sale and directing it to be cancelled, declaring the proceedings and sale void, requiring Onderdonk to release to the plaintiff his pretended claim to the land, and perpetually enjoining the city from executing any conveyance pursuant to the sale. On appeal the judgment was affirmed by the Supreme Court in the second district. The defendant Onderdonk appealed to this court.

J. E. Burrell for the appellant.

P. V. R. Stanton for respondent.

DENIO, C. J. The substance of the complaint is, that without having laid an assessment affecting the plaintiff's lots, the corporation proceeded to sell them as though they had been legally assessed; that the defendant Onderdonk became the purchaser at the sale, receiving a certificate of the purchase, and is seeking to consummate the transaction by obtaining a conveyance of the property from the corporation for a long term of years. Though it is improbable that the sale was made without the pretence of a valid assessment, the defendants have chosen to put themselves upon the naked case that there was no assessment; and the question to be determined is whether, conceding such a state of things to exist, the plaintiff, before he has been actually disturbed, is entitled to maintain this action and to have a judgment arresting the proceeding and setting aside what has been done. Ordinarily a party must wait until his rights have been actually interfered with before he can implead another from whom he anticipates an injury. But there are several exceptions to this rule; and when the jurisdiction in law and equity was administered in different courts and by different forms of proceeding, it was a common case for a party to appeal to a court of equity for relief against an apprehended injury to be effected by his adversary by some act *en pais* or by some legal proceeding which he could not defend himself against upon the principles of the common law. This class of cases has been narrowed by the law abolishing the distinction between the two jurisdictions; and now, as a general rule, if the party claiming relief has a good defense, whether it be of a legal or equitable nature, and if he can only be divested of his rights by some suit in court instituted by his adversary, he must wait until he is thus challenged, when he will be in time to bring forward his defense. That there is a certain degree of inconvenience in this rule, in many cases which may be supposed, is admitted; but the evil would be much greater if every person who could show that what he claimed to be his rights was

questioned by some other person, could call such person into court and compel him to disclaim or to litigate the matter in advance. Courts have commonly occupation enough in determining controversies which have become practical, without spending time in hearing discussions respecting such as are merely speculative or potential. The most prominent of the inconveniences referred to have been remedied by legislation, or by the settled practice of the courts. Thus, a party claiming to be the owner of lands, may, after a certain length of possession on his part, compel the determination of the claim of any other person to the title of such land.¹ So of the cases to which the remedy by bill of interpleader formerly applied. Besides these cases, there is a principle of equity which remains in force notwithstanding the confusion of remedies, by which a person may in certain cases institute a suit to remove a claim which is a cloud upon the title to his property.² If, however, the claim is based upon a written instrument which is void upon its face, or which does not in its terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it, before it is attempted to be enforced; for the party apprehending danger has his defense always at hand. In such a case this court has determined that no action at the suit of the party apprehending injury will lie.³ The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession of legal acts, and there is a defect as to one or more of the links. The party must in general wait until the pretended title is asserted. This principle is also very well settled by authority.⁴ In both these classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may in the meantime suffer inconveniences and even actual damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference. I am not able therefore to concur in the views of the City Court of Brooklyn, contained in the opinion which has been laid before us, to the effect that in every case where an instrument in the hands of another person is calculated to induce the belief that the title of the plaintiff is invalid, an action will lie to set it aside. In this case, therefore, if Onderdonk, the purchaser at the corporation sale, in as-

¹ 2 R. S. 312; Laws 1848, ch. 50; Code, § 440.

² Hamilton *v.* Cummings, 1 John. C. R. 517; Story's Eq., § 700 and *seq.*

³ Cox *v.* Clift, 2 Comst. 118.

⁴ Van Doren *v.* The Mayor, etc., of New York, 9 Paige 388; The Mayor, etc., of Brooklyn *v.* Merserole, 26 Wend. 132.

serting his title after he had perfected his purchase, would be obliged to prove the laying of the assessment as well as the other proceedings anterior to the conveyance, I should be of opinion, that the complainant had not established a case for relief. Neither the proceedings of the corporation, nor the conveyance to Onderdonk when obtained, would constitute such a cloud upon the plaintiff's title as is contemplated by the rule. It would be impossible for Onderdonk to recover the possession of the lots, for he could not establish the existence of the assessment, and the plaintiff might rest in perfect safety. But the 45th section of the charter of the city of Brooklyn provides that the conveyance under such a sale as was made in this case, which is to be executed under the corporate seal, shall briefly set forth the proceedings had for the sale of the premises, and that by force thereof the purchaser shall be entitled to the possession and to the same remedy to recover such possession as is provided by law for the removal of tenants who hold over after the expiration of their terms, and that such "conveyance shall, in any such proceeding, be deemed *prima facie* evidence of the facts therein recited and set forth."¹ A conveyance properly prepared under this provision would recite the ordinance or resolution of the common council imposing the assessment, and such recital would be presumptive evidence of the existence of that ordinance. It is true the owner of the land would be at liberty to disprove it, if he could obtain the evidence; but the statute contemplates that the purchaser shall be furnished with a document bearing on its face *prima facie* evidence of a title in him, and can only be impeached by proof *aliunde* of the falsity of its recital. The authorities to which I have referred admit that in such cases the party is not compelled to take the hazard of the loss of his evidence, but may while it is attainable call the party holding such a document into court and have the matter determined at once, so that the cloud upon his title may be dispelled. If the plaintiff would be entitled to set aside a conveyance, upon the facts stated in the complaint, if one had been obtained, then, inasmuch as the purchaser is seeking to obtain such a conveyance and the corporation of Brooklyn is ready to execute one, as is apparent from the terms of the certificate of sale, it is right that they should be enjoined from proceeding further towards that object. For the single reason, therefore, that the statute gives to the conveyance the effect which has been mentioned, I am of opinion that the City Court was right in overruling the demurrer and giving the plaintiff the relief which he sought.

Judgment affirmed.

¹ Laws 1834, p. 108.

COOPER v. JOEL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JULY 26, 27, 1859.

[Reported in 27 Beavan 313.]

ELIZABETH MACDONALD assigned her household furniture, pictures, etc., to the trustees of her husband's will, by way of indemnity. She afterward became considerably indebted, and five of her creditors, viz., Joel, Messrs. Wright, Nerwich, Lazarus, and Marcus obtained judgments against her. Executions issued upon these judgments, and her household furniture, pictures, etc., were seized by the sheriff and advertised for sale on the 15th of February, 1855.

The trustees of her husband's will immediately gave notice of their bill of sale to the sheriff.

The plaintiffs Cooper and Matthews (Mrs. Macdonald's sons-in-law), and her sons, were anxious to prevent a forced sale of the property, and they entered into negotiations with Messrs. Wright, who were both judgment-creditors, and acted as the solicitors of the other judgment-creditors, to prevent it.

Ultimately, terms were arranged between them, and on the 15th of February, 1855, the plaintiffs and the three other persons signed a memorandum, dated the day previous, which was in the following terms:

"In consideration of Mr. Joel consenting to postpone the sale under the execution against Mrs. Elizabeth Macdonald, and assigning his claim thereunder as we shall request, and in consideration of his and the other creditors under named taking payment of their debts as hereinafter mentioned, we jointly and severally undertake to guarantee the payment of the several debts owing from Elizabeth Macdonald by three equal installments, at twelve, twenty-four, or thirty-six months from the date hereof, with interest at £5 per cent. per annum, viz., Mr. Joel, £2,720; E. and H. Wright, £4,300; Abraham Nerwich, £500; E. Lazarus, £650; Mr. Marcus, £600. And we also jointly and severally agree with each creditor to execute a bond for securing the same on request. A satisfactory policy, if possible, to be effected on Mrs. Macdonald's life, and kept up and the policy deposited with Mr. Joel as further security. Dated this 14th February, 1855.

"C. H. MACDONALD.
"J. COOPER.
"H. W. MATTHEWS.
"E. MACDONALD.
"T. MACDONALD."

Immediately upon this memorandum being signed, the plaintiff Cooper, accompanied by Wright, went to the auctioneer, who had then sold a few lots, and directed him to discontinue the sale, but the auctioneer declined to do so, stating that he was acting under the authority of the sheriff, and could not act on Wright's instructions. The plaintiff Cooper and Wright then went to the under-sheriff, who, however, said he could not stop the sale without the authority of the trustees, who he said claimed the goods, and consequently the sale went on, and none of the executions were, in fact, withdrawn. Thereupon the plaintiff's solicitor, Mr. Reece, on the same 15th day of February, served upon Wright, on behalf of himself and the other judgment-creditors, a notice that the arrangement made with them that morning, and the agreement or undertaking the plaintiffs then signed, "had become null and void, inasmuch as the consideration for which they were induced to enter into such arrangement and to sign such agreement had failed, and that the said parties would not hold themselves bound thereby," and requiring him to deliver up the agreement or undertaking in order that the same might be forthwith cancelled.

The auction proceeded, and the whole of the property was sold.

The five judgment-creditors, in February, 1856, brought five several actions against the plaintiff Cooper, upon the guarantee, to recover the first installment on their debts.

Cooper and Matthews instituted this suit against the five judgment-creditors and the three other sureties, alleging that the guarantee or memorandum was signed and given by the plaintiffs in consideration of and upon the faith that the said sale should not be commenced, or, if begun, that it should be discontinued the instant the same was signed, that the consideration for the same had failed, and that the same had become inoperative and void.

The bill prayed, that the guarantee of February, 1855, might be declared to be inoperative and void, and that the same might be cancelled, and that the defendants might be restrained from proceeding upon it at law against the plaintiffs.

A motion was made on the 18th of November, 1857, for an injunction to stay those proceedings, which was ordered to stand over until after the trial of the five actions. On the 12th of April, 1859, judgment of *non pros*, for not proceeding to trial after notice, was signed in each of the five actions.

The cause now came on for hearing.

The defendant Wright filed an affidavit, stating that the plaintiff Cooper had gone out of business in consequence of pending liabilities. It specified a number of bills of sale given by him, and

stated that he, Wright, believing that Cooper, in case of a verdict going against him, would not or could not pay, but would take the benefit of the Insolvent Act, had determined himself and advised the other parties to the guarantee not to prosecute the actions for the present. That thereupon judgment of *non pros* was signed.

Mr. Palmer and *Mr. Hardy* for the plaintiffs.

Mr. Speed for the defendants.

Simpson v. Lord Howden;¹ *Hayward v. Dimsdale*;² *Ryan v. Mackmath*³ were cited.

The MASTER OF THE ROLLS. After reading the evidence very carefully I have come to the conclusion that the plaintiff is entitled to a decree. It was, in the first place, contended, on behalf of the defendants, that the court had no jurisdiction to order the instrument in question to be delivered up; but I am of a different opinion. The principle upon which the court orders a legal instrument to be delivered up is well expressed in *Simpson v. Lord Howden*,⁴ and the authorities there cited. That principle may be thus stated: If a legal instrument has stated on the face of it the defect which makes it impossible to sue at law, this court will not interfere; but, if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person to proceed at law upon it, or if there be a good legal defense, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument from loss of the evidence necessary for his defense at law to be unable to make available, then this court will interfere and order the instrument to be delivered up to be cancelled. To use the words of Lord Cottenham,⁵ the court orders such documents to be delivered up in consequence of "the danger that the lapse of time might deprive the party to be charged upon it of the means of defense." I am, therefore, of opinion that the court has jurisdiction in this case, because there is no legal defect apparent on the face of this guarantee.

The next question upon the hearing of the case is this: This is a bill to restrain an action brought upon a guarantee. I was of opinion, upon the hearing of a motion for an injunction, that the question depending upon matters of fact would be much better tried at law than in equity, and accordingly, on the 18th of November, 1857, I directed the motion to stand over until after the trial. This cause is now brought on in July, 1859, about a year and a half after that time. The plaintiffs in the actions at law have not thought fit to proceed with them and they have been *non pros'd*, which is equivalent to the

¹ 3 Myl. & Cr. 97.

² 17 Ves. III.

³ 3 Bro. C. C. 14.

⁴ 3 Myl. & Cr. 97.

⁵ Ibid. 102.

dismissal of a bill for want of prosecution. I must treat that as a verdict against them. In this court, when there is a question to be tried at law, the court orders the cause to stand over for a year, with liberty to the party to bring such action as he may be advised, and if he do not proceed at law, the court determines the case as if the action had been brought and decided against him. The defendants say, it was useless to proceed in the actions, as three bills of sale had been registered against the plaintiff Cooper, and they add that if they had proceeded and had recovered judgment, it would only have driven Cooper through the Insolvent Court. I think this court cannot go into the question of the greater or less degree of solvency of the plaintiff; it must determine upon the facts, and the defendants having had an opportunity of trying the action, and having failed to do so, it must be considered as if it had been tried and decided against them.

I have considered it my duty to read and consider the evidence, for I thought that it might not be satisfactory to the parties, if I were to determine the case as if there had been a verdict against the plaintiffs at law. I have, therefore, read and considered the evidence, and upon that evidence I think the plaintiff is in the right.

The case is this: There were five executions upon five judgments, and the sheriff who had taken possession of the lady's property, which was considered of great value, was about to sell it. The plaintiffs and three other persons went to the execution creditor and said, "we will give you a guarantee for the debts, payable by installments, provided you consent to stop the sale," and thereupon the execution creditor did consent. But, when they came to the auctioneer, it appeared that their consent was not sufficient to stop the sale, and that it required the consent of other persons. Accordingly, the auctioneer did not stop the sale, and two hours later, on the same day, the persons who had given the guarantee gave notice that as the sale was going on the guarantee was at an end. Now the first question is, what were the rights of the parties? I am of opinion that the guarantee was at an end, and that it is impossible to say that the guarantee was to be given in case the execution creditor consented to stop the sale, although such consent was ineffectual to produce the object for which it was given. The common sense and *bona fides* of the transaction is, provided they could, by means of such consent, stop the sale. The guarantee proceeded upon a common understanding between them, that the consent would be effectual for that purpose. The object was to stop the sale, not to make the execution creditor utter some unmeaning words. Accordingly, I think that being unable to stop the sale, the notice given by them that the guarantee was at an end was effectual.

Evidence was gone into to show that the agreement was revived on the following day, and that the sale was allowed to proceed for the next five days, in consequence of the plaintiffs being of opinion that the property, so far from being sacrificed, was selling beneficially. But after reading the evidence, I am satisfied that no fresh agreement was come to, and that the first agreement was put an end to when the notice was given.

In that state of circumstances, I think that the defendants could not succeed at law, and that this would have been a good defense to the actions. But, as the case which is made by the defendants, upon the affidavits, confessedly or professedly is, that the proceedings at law are only suspended, as they say "for the present," their argument being, that they may sue again upon a fresh installment under the guarantee becoming due, I am of opinion (referring again to the principle laid down by Lord Cottenham in the case I have referred to) that as lapse of time might deprive the plaintiffs chargeable upon this document of the means of defense, and as the defendants may hold it, and profess to hold it, for the purpose of suing at a future time, this court ought to interfere and direct it to be delivered up.

Therefore I must make a decree to that effect, and the costs must follow the event.

This decree was affirmed on appeal by Lord Campbell (1 DeG. F. & J., pp. 243, 244), in the following opinion :

THE LORD CHANCELLOR. I think that the decision of the Master of the Rolls must be affirmed. I do not, however, assent to the proposition, which has been advanced in argument, as to the jurisdiction of the court in such cases, and which amounts in substance to this, that a Court of Equity will interfere to restrain an action whenever the action ought not to be brought. If that was the rule, hardly any dispute could arise upon a contract, which might not be drawn into a Court of Equity.

But in this case there are peculiar circumstances, giving to this court jurisdiction to interpose by granting an injunction and directing the instrument to be delivered up. I have no doubt that substantially a material representation was made which was untrue. I will not enter into the conflict which there is in the evidence, but without assuming any positive agreement on the part of the judgment-creditors, I have no doubt that there were representations to the effect that they had power to stop the sale, and that the sale should be stopped. I am of opinion that these representations were untrue or incorrect, and that on this ground, at all events, the court has jurisdiction to interpose in the way which I have mentioned. It is clear that the plaintiffs never would have given the guarantee unless they had believed that the sale was to be stopped. *Res ipsa loquitur.* It is evident that both sides believed that the sale was to be stopped. Neither side contemplated that the consent of the trustees was necessary, and therefore this provision was not introduced. But the defendants must have been aware that the plaintiffs would have given no guarantee unless they believed that the sale was to be stopped. The sale proceeded, and the proceeds of the

sale went to the judgment-creditors, leaving the plaintiffs in the same situation in which they were before they gave the guarantee. Under such circumstances it was contrary to equity and good conscience to put the guaranteee in force.

Without, therefore, acceding to any such wide proposition as was laid down by Mr. Hardy, this appears to me a case in which the guaranteee should be delivered up. The defendant may, if he insists on it, have the decree varied, and made to correspond with the prayer of the bill, but I may say that this will make no difference as to the costs of the appeal.

PETER DOLAN, APPELLANT, *v.* THE MAYOR, ALDERMEN,
AND COMMONALTY OF THE CITY OF NEW YORK
ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER 21, 1875.

[*Reported in 62 New York Reports 472.*]

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint.¹

This action was brought to vacate certain assessments. The complaint contained three counts. The first setting forth proceedings taken under the act of 1813 (chap. 44) for the extension of Worth Street, in the city of New York, the appointment of commissioners of estimate and assessment, the making of a report by them and the confirmation thereof by the Supreme Court. The second count set forth similar proceedings for the widening of Laurens Street; and the third count for the extension of Church Street. By each of the reports, as alleged, an assessment was imposed upon lands of plaintiff. It was further alleged that the reports of the committees on recommending these improvements and the resolutions authorizing them, were not published as required by sections 7 and 37 of the charter of 1857 (chap. 446); that the fact of the non-publication does not appear in the records of the proceedings; that the assessments are due and payable and that the comptroller will proceed to sell; and his lease on sale is made, by statute, presumptive evidence of regularity. The complaint asked an injunction restraining collection, an adjudication declaring the assessment irregular and void, and vacating and cancelling them of record.

Defendants demurred on the ground that the complaint did not set forth facts constituting a cause of action.

¹ Reported below, 6 Hun 506.

Charles E. Miller for the appellant.

William Barnes for the respondents.

RAPALLO, J. The complaint shows that the assessments sought to be vacated by this action, were for the extension of Worth Street, widening of Laurens Street, and the extension of Church Street, and alleges that the reports of the commissioners of estimate and assessment in all of these cases, were confirmed by the Supreme Court several years before the commencement of this action.

The ground upon which these assessments are now sought to be set aside is, that the reports of the committees recommending these improvements and the resolutions authorizing them were not published as required by the seventh and thirty-seventh sections of the charter of 1857. We are of opinion that it is too late to raise this question after confirmation of the report of the commissioners of estimate and assessment by the Supreme Court in street cases, under the act of 1813. There is nothing in the complaint showing want of notice to the plaintiff of the proceedings in Supreme Court. That court acquired jurisdiction of the matter by the application of the city for the appointment of commissioners, and all parties interested had an opportunity then to litigate the validity of the resolution ordering the improvement. If no objection to the resolution was raised before the Supreme Court during the pendency of the proceeding, its validity and regularity must be deemed to have been conceded.

It has already been decided by this court that an application cannot be made under chapter 338, of the Laws of 1858, to vacate an assessment for a street opening or widening under the act of 1813. That decision was placed upon the ground that proceedings for such assessments are conducted before the court and its confirmation of the report of the commissioners is a judgment pronounced on a full hearing of the parties, and conclusive in its character as to all questions litigated or which might have been litigated in the proceeding.¹ The same principle precludes a review of the regularity of such proceedings in an action by the party assessed unless perhaps in case of such fraud or other circumstances as would authorize an action to set aside an ordinary judgment. No such question is here presented.

We are also of opinion, for the reason stated in the opinion of Miller, J., in the case of *John Jacob Astor v. Mayor, etc., of N. Y. et al.*,² decided at the present term, that the act of 1872 (§ 7, chap. 280, Laws of 1872) is applicable to this case and that the court below was correct in its conclusion, that that act prohibited the

¹ *In re petition of Arnold*, Court of Appeals, February 2d, 1875.

² 62 N. Y. Rep. 580.

vacating of the assessments for want of publication of the reports and resolutions.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

BROOKS ET AL. *v.* HOWLAND ET AL.

IN THE SUPREME COURT OF NEW HAMPSHIRE, MARCH, 1877.

[Reported in 58 *New Hampshire Reports* 98.]

IN EQUITY. The plaintiffs allege that the defendant Howland, as tax collector, sold their lands for taxes to the defendant Oakes, and caused an account of the sale to be recorded; that the sale was illegal and void, "for reasons apparent upon the facts and records" stated and referred to in the bill. The plaintiffs, claiming that the sale and record thereof constitute a cloud upon their title, pray for a decree that the sale is void; that the defendant Howland be required to make a legal application of money paid by the plaintiffs to him for taxes, as stated in the bill, in such way as to discharge their lands thus sold from any tax lien; that he be restrained from giving Oakes a deed of the property, and that Oakes be restrained from receiving the same, and for general relief.

The defendants demurred, alleging that the plaintiffs have not, by their bill, stated any grounds for equitable relief; that they have a plain and adequate remedy at law; and that the bill is multifarious.

Ladd and Batchellor for the plaintiffs.

Bingham & Mitchell and *Carpenter* for the defendants.

FOSTER, J. The plaintiffs' suggestions in their prayer, as to the *modus operandi* of relief, are neither more nor less than an application for one substantive thing, namely, a decree of invalidity of the sale, with appropriate injunctions for giving effect to such decree; and to this end both defendants are necessarily made parties to the bill. It is not multifarious, and there is no misjoinder of parties.¹

The demurrer confesses that the plaintiffs have paid all the taxes assessed upon them, whether legally assessed or not. Payment of a tax by the owner is an absolute defeat and termination of any statutory power to sell.²

But the plaintiffs seek equitable relief, because they are unable to discover any other plain and adequate remedy for the removal of the cloud which a sale, fair and regular upon its face, but illegal in fact,

¹ *Bell v. Woodward*, 42 N. H. 190.

² *Cooley on Taxation*, 322, and cases cited.

has cast upon their title. They fear that, in case the purchaser should refrain for a long time from any such attempt to disturb their possession as would entitle them, by resistance thereto, to defeat his claim in proceedings at law, the death of witnesses, loss of papers, or other casualties occurring, might render the proof of their title difficult, if not impossible, and so they may ultimately be deprived of their property. And we are of the opinion that they are entitled to the relief sought, and that the demurrer should be overruled.

A court of equity may as well enjoin the execution of a collector's deed, as decree its cancellation.¹ The jurisdiction of equity is maintained to the fullest extent for the purpose of setting aside conveyances, apparently fair and legal, but tainted in fact with illegality. The principles of equity jurisprudence are not merely remedial, but preventive of injustice. Although equity may not interfere to cancel a deed or other instrument, the illegality or invalidity of which is so apparent upon its face that the instrument is incapable of casting a shadow upon one's right or title, it is quite otherwise where, by reason of the concealment of its defects, the deed or other instrument may be applied to improper purposes and used for the promotion of vexatious litigation.²

A party who holds a tax certificate to land, and resists an application to have it cancelled, as a cloud upon the rightful title, cannot well say that he does not set up a claim under it.³

Courts of equity will not restrain the collection of a tax illegally assessed, in a case where the party has a plain and adequate remedy at law.⁴ And where the tax is assessed as a personal charge, or against personal property, the remedy at law is presumably adequate. If the tax is illegal, and the party makes payment, he is entitled to recover back the amount;⁵ but where the effect of the sale of realty is to cast a cloud upon the title, equity will interfere to prevent it.⁶ The case of *Norton v. City of Boston*,⁷ cited by the defendants, seems to have been controlled by considerations of the limited jurisdiction of equity in such matters, as declared by the court in *Loud v. Charlestown*,⁸ referring to Mass. Gen. St., ch. 12, § 42, with the additional remark : "If the Legislature had intended to give parties fur-

¹ Cooley on Taxation, §§ 542, 543.

² 2 Story Eq. Jur., §§ 700, 700a; Snell's Principles of Equity, 498, 502.

³ *Dean v. Madison*, 9 Wis. 402.

⁴ *Brown v. Concord*, 56 N. H. 375.

⁵ Cooley on Taxation, § 538; *Savings Bank v. Portsmouth*, 52 N. H. 17; *Brewer v. Springfield*, 97 Mass. 152.

⁶ Dillon Mun. Corp., §§ 737, 738; Cooley on Taxation, § 536; *Brown v. Concord*, 56 N. H. 375, 384; *Hannewinkle v. Georgetown*, 15 Wall. 547; *High on Inj.*, §§ 269, 272, 367, 368; *Key v. Munsell*, 19 Iowa 305.

⁷ 119 Mass. 194.

⁸ 99 Mass. 208.

ther remedies in equity in respect to taxation, they would have been likely to make express provisions on the subject, with proper limitations.

Demurrer overruled.

GEORGE CLARK, APPELLANT, *v.* IRA DAVENPORT, AS COMPTROLLER, ETC., RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 15, 1884.

[*Reported in 95 New York Reports 477.*]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 23, 1883, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.¹

The nature of the action and the material facts are set forth in the opinion.

James B. Olney for appellant.

D. O'Brien, Attorney-General, and *I.W. A. Poste* for respondent.

MILLER, J. This action was brought to set aside a certificate issued by the comptroller upon a sale of lands for taxes on the ground that the same was irregular and void, and to cancel such certificate if the same had been issued; and if such certificate had not been issued, to enjoin the comptroller from issuing the same, and also to enjoin him from executing a deed by virtue of the sale made for said taxes. The right to maintain the action is based upon the ground that such certificate of sale is a cloud upon the plaintiff's title to the lands in question. There is no doubt that the taxes for which the lands were sold were irregularly and illegally laid, and hence there was no valid ground for making the sale, and the certificate issued by virtue of such sale would be unauthorized. It is well settled by the decisions of this court that to authorize the interposition of the court to remove the lien of an assessment as a cloud upon title, it must appear that the record of proceedings are not void upon their face, and that the claimant under it would not, by the proof which he would be obliged to produce in event of an attempt to enforce his claim, develop the defect rendering it invalid.² Under this rule it is apparent that the certificate of sale for the taxes irregularly and unlawfully laid could not be made available without proof show-

¹ Reported below, 30 Hun 161.

² Dederer *v.* Voorhies, 81 N. Y. 156; Guest *v.* City of Brooklyn, 69 Id. 506.

ing the irregularity and invalidity of the proceedings, and hence, so far as this certificate is concerned of itself, it would seem that it would, with the accompanying proof necessary to give it any force whatever, establish its own invalidity and would not make out a cloud upon the title of the lands which had been sold for taxes.

The claim of the plaintiff, however, rests upon the effect to be given to the certificate by the deed of the comptroller, which might afterward be executed in pursuance of the certificate and in accordance with the statute. After the certificate has been issued as the statute requires, it is provided that the comptroller, six months prior to the expiration of the two years allowed for redemption of the lands, shall give notice of the failure to redeem, and that in case redemption is not made by a day certain, the lands will be conveyed. And it is further provided that in case of the failure of the person entitled to redeem such lands within two years, the comptroller is required to execute to the purchaser, his heirs or assigns, in the name of the people of the State, a conveyance of the lands so sold, and such conveyances are made presumptive evidence that the sale and all proceedings prior thereto, from and including the sale of the lands, and all notices required to be given prior to the expiration of the two years allowed to redeem, were regular.¹ It would appear that when the deed has been executed that the introduction of the same as evidence would on its face show title in the grantee, and hence such deed might well be considered as a cloud upon the title of the owner whose lands had been illegally sold for taxes.

The plaintiff's action is evidently brought to avoid the effect to be given to the certificate in connection with the subsequent proceedings. While a court of equity may entertain a suit to remove a cloud upon a title and also to prevent one, in the latter case it must be made to appear that there is a determination, on the part of the defendant, to create the cloud, and it is not sufficient that the danger is merely speculative.² The question then arises whether there was any danger to the plaintiff, at the time of the commencement of the action, that there was any such determination to execute a deed of the lands, in pursuance of the certificate, by the comptroller and thus create a cloud upon the plaintiff's title, which would authorize the interposition of a court of equity to avoid it. Under the statute whenever the comptroller shall discover, prior to the conveyance of any land sold for taxes, that the sale was, for any cause whatever, invalid or ineffectual to give title to the lands sold, the lands so improperly sold shall not be conveyed, but the comptroller shall cancel

¹ 2 R. S. [7th ed.] 1026, § 4^c; Id. 1028, §§ 61, 62, 63, 65.

² *Sanders v. Yonkers*, 63 N. Y. 489.

the sale, etc.¹ The statute also provides for cancelling the deed by the comptroller after it has been executed, when the discovery is made that the sale was invalid.² Under this statute an application could have been made to the comptroller to set aside the sale by reason of the irregularity and invalidity in imposing the taxes for which the sale was made, and had he refused to do this in a proper case, no reason appears why the proceedings might not be reviewed by *certiorari* or an application made by *mandamus* to compel him to do so. The complaint contains no allegation, nor was there any proof upon the trial that a demand was made upon the comptroller, since the sale, to cancel the same, nor is it alleged in the complaint, nor did it appear upon the trial, that the comptroller threatened or that he intended to execute a deed, in pursuance of the certificate, of the lands sold. In fact the action was brought within a month after the sale had been made, and the time was not near at hand where the six months' notice should be given or a deed should be executed in accordance with law. It was not then manifest that there was any intention on the part of the comptroller to execute a conveyance of the lands sold. Before the notice had been given, which the law requires, there would appear to be no avowed intention to insist upon the validity of the certificate and to execute a conveyance of lands. Until that time arrived evincing that the plaintiff was in imminent danger of having a cloud placed upon the title to his lands by the action of the comptroller, it is not obvious that the intervention of a court of equity was essential in order to restrain the comptroller from performing an act which might impair or affect the title of the plaintiff. The contemplated injury, therefore, was entirely speculative and without sufficient grounds to justify an interposition of a court of equity. Mere apprehension and groundless fears are not enough to sanction an action of this character.

The authorities hold that in cases instituted for the purpose of setting aside the certificate of sale upon assessments on the ground of invalidity of prior proceedings, unless the certificates are a presumptive lien under the statute, an action to set them aside as a cloud upon title cannot be maintained.³

The claim of the plaintiff's counsel that the case of *Sanders v. Yonkers*⁴ is not analogous is not meritorious, and, as we understand, the case at bar is distinctly brought within the principle of that case. The danger here was very remote and founded entirely on apprehension, and within the rule laid down in the case cited no action could

¹ 2 R. S. [7th ed.] 1032, § 83.

² Id., § 85.

³ *Allen v. Buffalo*, 39 N. Y. 386; *Scott v. Onderdonk*, 14 Id. 9.

⁴ 63 N. Y. 489.

be maintained. Conceding, as is claimed by the appellant's counsel, that the irregularity might not appear in an action brought to recover possession of the lands after a deed had been executed, we still encounter the fact that the execution and delivery of such deed might never occur and was not threatened, or likely to take place at the time when the action was brought.

It cannot, we think, be said that within the case of *Sanders v Yonkers*¹ the comptroller threatened to create a cloud upon the title, for, as we have seen, the right still existed in him to cancel the certificate, and, for aught that appears, he may have concluded to take such a course before giving the notice or executing the deed. His action, in this respect, was the subject of review, and he was under no obligation to execute the deed if he deemed the taxes illegal, and the case here presented is not analogous to that of *Scott v. Onderdonk*,² cited by the appellant's counsel, where the judgment was put on the ground that the corporation of the city of Brooklyn was ready to create a cloud upon the title, as was apparent from the terms of the certificate of sale, and therefore it was right they should be enjoined from proceeding further toward that object. No such intention is apparent in the case considered, and there was no ground for claiming that the comptroller, if he had had the power to do so, would have executed the conveyance of the lands sold and thus impaired the title of the plaintiff.

We are referred to numerous authorities in the courts of other States, which, it is claimed, sustain the position of the appellant's counsel. We do not deem it necessary to discuss them in detail in view of the fact that the question considered is fully settled by the decisions of our own courts already cited.

From the examination which we have given to the case under consideration, we are brought to the conclusion that the action of the plaintiff was prematurely brought, and that no error was committed upon the trial.

The judgment should be affirmed.

All concur.

Judgment affirmed.

¹ 63 N. Y. 489.

² 14 N. Y. 16.

DULL'S APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA, FEBRUARY 2, 1886.

[*Reported in 113 Pennsylvania State Reports 510.*]

APPEAL from the Court of Common Pleas of Fayette County : in equity : of January Term, 1886, No. 191.

This was an appeal by Jacob Dull from a decree of said court dismissing his bill, wherein John W. McDowell was defendant.

The following is an abstract of the plaintiff's bill :

1. That your orator is now, and has been for five years last past, continuously a resident of Connellsville Borough, in said county.

2. That your orator owned a lot of ground in said borough, during the whole of the year 1879, and now owns and has the same in his possession.

3. That in July, 1879, your orator began the building of a house on the said lot and finished the said house in the latter part of the said year, when your orator began his residence therein, and the said house has been continuously occupied ever since by a family residing therein.

4. That E. V. Goodchild was the collector of State and county taxes for said borough in the year 1879, and that on the 23d day of January, 1880, he made, as such collector, his official return to the commissioners of said county that he had not collected and could not collect the sum of sixty-three cents, county tax charged on said lot for the year 1879.

5. That upon said return by the said collector, the commissioners of the said county directed the same to be sold for the said tax ; whereupon the said lot was duly advertised as unseated land, and sold by the treasurer of the said county on the day of June, 1882, to John W. McDowell, the respondent above named, to whom a deed for the said lot was executed and delivered by the said treasurer, on the 7th day of September, 1882.

6. That the sale ought never to have been made, because, 1st, your orator resided in said borough as aforesaid ; 2d, your orator owned a large amount of personal property in said borough ; 3d, there was personal property on said lot during the year 1879, out of which the tax could have been made ; 4th, your orator or his tenants resided on said lot from September, 1879, to the present time.

7. The said respondent holds the said deed, claims the same to be a good title, and asserts his ownership of the same premises thereunder.

Your orator therefore prays your Honor to make a decree that the

said sale passed no title to the respondent, and that the said deed be delivered up to your orator to be cancelled.

For such other and further relief as to right and justice may belong, and to your Honor may seem meet.

The following is an abstract of the defendant's answer :

1. I have no knowledge of the truth or falsity of the allegations contained in the first paragraph of the bill.

2. I do not admit or deny the allegations contained in the second paragraph of plaintiff's bill, because I do not know to what lot of ground he refers, but if he refers to the same lot of ground as in paragraph fifth, then I deny that he is the present owner of said lot of ground.

3. I deny the allegations contained in the third paragraph of plaintiff's bill.

4. I admit the allegations contained in the fourth paragraph of plaintiff's bill.

5. I admit the allegations contained in the fifth paragraph of plaintiff's bill.

6. I deny that said sale ought never to have been made, as alleged in the sixth paragraph of plaintiff's bill, and deny that there was personal property on said lot during the year 1879, out of which the tax could have been made, deny that plaintiff or his tenants resided on said lot from September, 1879, to the present time, and aver that the plaintiff had notice that said lot of ground had been returned as un-seated land before the same was sold by the county treasurer for taxes, and disregarded the same, and aver, further, that said plaintiff had notice to redeem said lot of ground after the same had been sold, and before two years had elapsed from the sale thereof, which notice he disregarded.

7. I admit the allegations contained in the seventh paragraph of plaintiff's bill.

8. I deny that plaintiff is entitled to equitable relief, and pray that the bill of plaintiff be dismissed, and I be allowed my costs.

The plaintiff joined issue on the matters alleged in the answer.

The bill and answer were referred to W. G Guiler, Esq , as Examiner and Master, who found and reported the following facts :

1. That Jacob Dull, the plaintiff, bought the lot of ground in controversy from the assignee of Joseph Johnston in May, 1879, and secured a deed therefor.

2. That in July thereafter he placed a fence around it enclosing the ground the following year.

3. That in August, 1879, the plaintiff commenced building a house on the lot of ground and finished it in October of the same year.

4. That the plaintiff moved into the house about the time it was finished, and lived there until August, 1882.

5. That after he moved out it was occupied by persons as his tenants.

6. That at the time E. V. Goodchild, the tax collector, returned it as unseated land, the plaintiff owed sixty-three cents tax on the same, but there was sufficient personal property on the premises to make the tax.

7. That the proceedings prior to the sale were irregular.

8. That the defendant has not attempted to make good his title in any way, nor has he attempted to assert his ownership of the premises other than what he stated in his answer filed to plaintiff's bill. The question to be determined in this case is whether, under all the facts, as found by the Master, the plaintiff is entitled to the equitable relief asked for by him in his bill of complaint. In Barclay's Appeal,¹ Justice Gordon, in delivering the opinion of the court, says : "If there is anything in the equity practice of Pennsylvania it is that a court cannot by bill bring before it parties having adverse claims to land between whom there is no relation of trust or contract, and settle their several titles by decree, and more than this, we know of no power in equity or elsewhere, by which the owner of an adverse title can be called into court by the party in possession to assert and defend that title on penalty of forfeiture should he refuse to do so." Hence, it seems to be the rule in this State, that in the absence of any relation of trust or contract, or where there has been no fraud on the part of the holder of an adverse title, the parties are left to their legal remedies.

Hence, the Master is of the opinion that this is not a case in which a court of equity ought to exercise its power, and, therefore, the relief asked for by the plaintiff should be refused and the plaintiff's bill dismissed, and at his costs.

The plaintiff filed exceptions to the report. After hearing, the court, Inghram, P. J., entered the following decree :

The exceptions to the report of the Master are dismissed ; the report is confirmed. It is further ordered, adjudged, and decreed that the plaintiff's bill be dismissed, and that the said plaintiff pay the costs of this proceeding.

The plaintiff thereupon took this appeal, assigning said decree for error.

Edward Campbell for appellant.

A. D. Boyd for defendant in error.

¹ 12 Norris 53.

Mr. Justice GREEN delivered the opinion of the court, October 4th, 1886.

The Master found as facts in this case that the plaintiff held title to the land in question by deed from the assignee of the former owner, that he subsequently occupied the land, built a house upon it, in which he dwelt from October, 1879, to August, 1882, and from that time on he was in possession by his tenants. He also found that when the land was sold as unseated land for taxes, the plaintiff owed sixty-three cents taxes, but that there was personal property on the premises sufficient to make the tax. This tax title, which the defendant bought and took and held a deed for, was therefore apparently an invalid title. Nevertheless, the defendant had the deed recorded, and, by his answer to the plaintiff's bill, claims title under the treasurer's deed in himself, and denies the matters of fact which are alleged in the plaintiff's bill as the grounds of the invalidity of the defendant's deed. These are, 1st, that at the time of the tax sale the plaintiff resided in the borough where the land is situated; 2d, that the plaintiff owned a large amount of personal property in said borough; 3d, that there was personal property on the lot, out of which the tax could have been made; and 4th, that the plaintiff was in possession of the premises from 1879 to the time of filing the bill. All these are matters of fact resting in parol, and the evidence to prove them dies with the witnesses who know them. The plaintiff is in possession, and therefore cannot bring an action of ejectment to recover the land or prove his title. The treasurer's deed is regular on its face, and in accordance with the requirements of the law, so far as can be judged by anything apparent in its language. The Master found that the defendant had not asserted his title, except as stated in his answer, but it cannot be doubted that it is there asserted emphatically and adversely. What, then, is the plaintiff's situation? He is prevented from establishing his title by any proceeding at law, but he is threatened with an adverse paper title placed upon record by the defendant, and by him asserted and pleaded in a judicial proceeding. It is beyond all question that the defendant's deed is a cloud, and a serious one, upon the plaintiff's title. Unless he can remove the cloud by the present proceeding he is without remedy. The Master held that no relief could be granted because there was no relation of trust or contract between the parties, and cites Barclay's Appeal¹ as authority. The court below sustained this conclusion, though without an opinion. A very slight examination of Barclay's Appeal shows that it was not a case in any respect like the

¹ 12 Norris 53.

present, or raising the same question. There was no claim of adverse title to the plaintiff's land, and the bill was brought to obtain a decree for the removal of certain machinery from the premises of the plaintiff. The remarks quoted from the opinion were made in reference to the facts of that case, and are entirely correct as expressing the general state of the law upon the subject named. But they did not affect to discuss, or even state, the law upon the subject of the equity jurisdiction to remove clouds upon title, and could not have been so intended without conflicting with repeated decisions of this court. Not a single authority was cited, either by the counsel concerned or in the opinion of this court, nor was any proposition expressed respecting this kind of equity jurisdiction.

Our own cases show that we have adopted, and fully recognize, the equity jurisdiction to remove clouds upon title, as fully and as broadly as it is described in the equity text-books and decisions. Thus in *Kennedy v. Kennedy*,¹ Mr. Justice Strong said: "And there are very many cases analogous to bills of peace, in which a chancellor has interfered to quiet the enjoyment of a right, or to establish it by a decree, or to remove a cloud from the title. Indeed, this is one of the well-recognized branches of equitable jurisdiction, though its extent is not clearly defined." This was said in a case in which there was no relation of trust or contract, and the title was legal only. Relief was denied for want of proof, but not for want of jurisdiction. The same remark is true of the case of Stewart's Appeal,² in which the late Chief-Judge Sharswood sums up a discussion of the subject thus: "The best expression of the rule, as it seems to me, is to be found in an opinion of the Supreme Court of Massachusetts, in *Martin v. Graves*,³ by Merrick, J.: 'Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice or the rights of the parties may require.'" It will be observed that the rule thus stated is without any limitation to cases of trust or contract. In the principal case of *Martin v. Graves* there was no relation of trust or contract between the parties to the suit, and the titles claimed by the respective parties were legal only. The plaintiffs alleged fraud in the defendants in procuring the deed sought to be set aside, but the jurisdiction was not put upon the ground of

¹ 7 Wr., on page 417.

² 28 P. F. S. 88.

³ 5 Allen 661.

fraud, but on the general ground of cloud upon the plaintiff's title. In 2 Story Eq., § 700, the writer, after stating the jurisdiction to be undoubted, says: "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. . . . If it is a deed purporting to convey lands, or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title." In the first note (*a*), entitled "Cloud upon title," the annotator has discussed the whole subject of equitable jurisdiction upon this ground, gathering together and classifying a great number of decisions, English and American, illustrating the circumstances in which relief will be given or refused. He says on p. 12 (edition of 1886): "Assuming, however, that the plaintiff is in a position to ask for relief, he will be entitled to it upon establishing the existence of any such facts as the following: 1. An invalid deed or instrument relating to the title to land, the invalidity of which does not appear therein; as, e.g., an invalid tax deed or receipt," citing a number of cases, among which is *Russell v. Deshon*.¹ Upon referring to this case it is found to be identical in principle and almost identical in its facts with the present case. The defendant bought the plaintiff's land at a tax sale for non-payment of taxes. The plaintiff alleged that he did not know the tax was unpaid, but supposed it was paid when he acquired his title. He applied to the defendant to release his tax title, but the latter refused to do so, and the plaintiff then filed a bill to remove the cloud on his title and compel a release. It happened that the tax title was invalid because the sale was made more than two years after the warrant to collect the tax was issued. The bill was demurred to for want of equity, but the court overruled the demurrer and granted the relief prayed for. On p. 344 the court say: "The collector's sale was therefore void, and his deed conveyed to the defendant no valid title. But as the defendant has caused the deed to be recorded, and refuses to release to the plaintiff, and claims that he owns the premises, the collector's deed to him creates a cloud on the plaintiff's title. The plaintiff having continued in possession of the premises since he took his deed in November, 1875, cannot try his title by writ of entry, and can maintain a bill in equity to remove the cloud from his title."

In *Cloustan v. Shearer*,² it was held that a person in possession of land, and taking the rents and profits, may maintain a bill in equity to quiet his title against one who, as to him, is dispossessed and disseized, but asserts an adverse title under a mortgage, the validity of which is denied by the plaintiff.

¹ 124 Mass. 342.

² 99 Mass.

The same doctrine was applied in the case of a mortgage of personal property in *Shearman v. Fitch*,¹ and the court said in the opinion sustaining the bill: "But where a title to real estate is claimed, against which there is no present recovery by action at law, a bill in equity may be maintained to set it aside."

In *Hayward v. Dimsdale*,² Lord Chancellor Eldon held that there was jurisdiction in equity to order a deed forming a cloud upon the title to be delivered up, though the deed is void at law.

In 3 Pomeroy's *Equity Jurisprudence*, § 1398, it is said, "the jurisdiction to remove clouds from title is well settled; the relief being granted on the principle *quia timet*, that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title." In the foot-notes very numerous cases are collected, the substance of them being thus expressed: "When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession holding the legal title will be left to his remedy by ejectment under ordinary circumstances, but when he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity (citing many cases). When, on the other hand, a party out of possession has an equitable title, or when he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned," quoting numerous decisions.

The references to authorities may be closed with a single citation from one of our own cases, *Eckman v. Eckman*,³ in which we said, Woodward, C. J.: "Not only are accident, mistake, and fraud recognized grounds of relief, but if an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for a sinister purpose; and, according to Judge Story, the modern decisions entitle him to relief, *quia timet*."⁴ In none of the cases have we been able to discover that this kind of relief has been withheld, unless there was a relation of trust or contract between the parties. The jurisdiction has been asserted and enforced as an independent source or head of jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust, or account, or indeed any other basis of equitable intervention. Of course, it must be exercised only in plain cases, and with much care, and not

¹ 98 Mass. 59.

³ 5 P. F. S. 269.

² 17 Ves. Jr. 111.

⁴ 1 Story Eq., § 700.

at all where the party has an adequate remedy at law. But where there is no adequate legal remedy available to the party, and the facts are clearly such that he ought to be relieved, there can be no doubt of his right to relief in equity in the manner invoked in the present case.

We are of opinion that upon the facts found by the Master, and upon the testimony taken before him, the plaintiff is entitled to be relieved against the tax deed held and set up by the defendant. We regard the deed as invalid. It is most certainly a serious cloud upon the plaintiff's title. The defendant asserts it, but brings no action upon it, the plaintiff is in possession and therefore can bring no ejectment; his evidence to prove the invalidity of the defendant's deed rests in parol and may be lost, and the defendant's deed may be used vexatiously and injuriously to his disadvantage. These being the clear facts of the case, the plaintiff is entitled to relief by having the defendant's deed delivered up to be cancelled.

Now, to wit, October 4th, 1886, the decree of the court below is reversed at the cost of the appellee, and it is further ordered, adjudged, and decreed that the plaintiff's bill be reinstated, and that the defendant do forthwith surrender and deliver up to the plaintiff for cancellation the treasurer's deed, held by him from Levi Bradford, treasurer, dated the seventh day of September, A.D. 1882, and mentioned in the plaintiff's bill, and that the plaintiff do thereupon pay to the defendant the purchase-money (\$4.30) four dollars and thirty cents, paid for the land, and the fees paid for recording the same, and interest on both sums from the date of their payment; and further that the costs of the case, other than the costs of this appeal, be paid equally by the parties.

GORDON, J., dissents.

WILLIAM MOORES, RESPONDENT, *v.* JOHN TOWNSHEND,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 1, 1886.

[*Reported in 102 New York Reports 387.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of October, 1884, which affirmed a judgment in favor of plaintiff entered on a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

John Townshend for appellant.

Robert L. Wensley for respondent.

RUGER, Ch. J. The relief asked for in this action, and granted, by the judgment appealed from, required the defendant to deliver up for cancellation, as a cloud upon the title, the conveyance under which he occupied the premises in dispute, and that the clerk of arrears cancel the conveyance, and also all records and entries, relating to the same, in his office. This relief was purely equitable in character and needed for its support the proof of some facts giving the court jurisdiction of such a cause of action.¹

We have been unable to discover, either in the evidence or the findings, any proof of such facts, or of facts sufficient to entitle the plaintiff to either legal or equitable relief. The complaint alleged that the plaintiff was the owner of the premises in dispute, and, although this allegation was denied by the answer, neither the evidence nor the findings in this respect supported the complaint. The claim of the plaintiff for relief rested wholly upon the truth of this allegation, and, being totally unproved, there is no theory upon which he could be entitled to judgment upon the findings, for any relief.

The only title in the plaintiff as appears by the findings of fact, is that derivable from a deed purporting to be executed to him, by one John A. Foley, describing himself as a referee duly appointed in a decree in partition, entered at a Special Term of the Supreme Court January 31, 1882, in an action between one Freeman, plaintiff, and one DeGroat and others, defendants, authorizing the sale of the premises in question by such referee. The parties to the partition action other than those named are not disclosed, and there is no proof or finding that any of them or their grantors ever had title to, or possession of the premises in dispute or any part thereof. On the contrary, the allegations of the complaint as well as the proof showed that the defendant Townshend was, at the time of such decree and for a long period of time prior thereto had been, in possession of the premises, claiming title under a conveyance, dated September 19, 1873, to him, from the comptroller of the city of New York, executed in pursuance of a sale for the non-payment of an assessment, duly imposed in accordance with the statute, by the municipal officers of New York. If we look at the proof it does not aid the findings, for it was wholly confined to the production and proof of the referee's deed and certain alleged terms of sale, which did not disclose any fact bearing upon the ownership of the premises.

This proof was entirely inadequate to establish any title in the plaintiff, as against a stranger to the action in which it was given. The evidence was undeniably competent and was unobjectionable,

¹ *Heywood v. Buffalo*, 14 N. Y. 534, 540; *Bockes v. Lansing*, 74 Id. 437

except as to the order of proof. The question arising thereon was solely as to the legal sufficiency of the evidence, and was fairly presented by the defendant's exception to the finding of law directing judgment for the plaintiff.

It is essential to the support of a judgment that the findings of fact should establish a legal right on the part of the successful party to the relief granted, and when they do not and there is nothing in the evidence to show such right, an exception to the legal conclusion of the court directing judgment, raises the question, whether upon all of the facts found the party succeeding is entitled to the judgment directed.¹ The question, therefore, seems to be properly raised in the case and requires the reversal of the judgment appealed from.

It is further urged by the appellant that the facts disclosed on the trial did not show any right on the part of the respondent to equitable relief. We think this point also is well taken. The only ground alleged for the relief demanded, was the want of an adequate remedy at law, and yet the facts stated showed presumptively the existence of such a remedy, and the falsity of the averment. No reason is averred in the complaint why the plaintiff could not obtain all of the relief to which he was entitled by an action of ejectment; and an examination of the findings and evidence shows that none in fact existed.² The complaint was manifestly insufficient in this respect.³

We have been unable to find any case where a party out of possession, has been allowed to sustain an action *quia timet* to remove a cloud upon title, except when it was specially authorized by statute, or when special circumstances existed affording grounds for equitable jurisdiction, aside from the mere allegation of legal title. Indeed the right to resort to a court of equity in such cases was originally based upon the assumption that the legal title to the property had been established by an action at law, and jurisdiction was entertained solely for the purpose of protecting the party in the enjoyment of rights in possession thus legally established, and while the jurisdiction has in the course of time been somewhat extended, it has never been stretched to cover cases brought merely to establish a legal title, or recover possession alone.⁴ In all the cases cited to the effect that equity will entertain jurisdiction to set aside assessments and conveyances as a cloud upon title, the party bringing the action was in pos-

¹ Hemingway *v.* Poucher, 98 N. Y. 281, 287.

² Phillips *v.* Gorham, 17 N. Y. 270.

³ Bockes *v.* Lansing, 74 N. Y. 437, 443; Ocean Nat. Bk. *v.* Olcott, 46 Id. 12, 19; Allerton *v.* Belden, 49 Id. 373, 378; Venice *v.* Woodruff, 62 Id. 462, 467.

⁴ Spence's Eq. Jur. 658; Story's Eq. Jur. [11th ed.], § 711; Adams on Equity, 199; Pomeroy's Eq. Jur., §§ 1395-1399.

session of the property, or other circumstances gave equitable jurisdiction.¹ When the invalidity of the disputed title appears upon the face of the conveyance, or in any proof which the claimant is required to produce in order to maintain an action to establish it, no suit whatever can be maintained in equity to set it aside, because it is said that a title obviously void, does not constitute even a cloud upon the title of the true owner. The question in this case is not as to the propriety or impropriety of uniting legal and equitable causes of action in one complaint, but it is whether sufficient facts have been alleged and proved to sustain such respective causes of action. It was said by Judge Rapallo in *Bockes v. Lansing*² that "to sustain such an action the facts must be alleged which would be necessary to entitle him to the relief, had he sought it in separate actions." The cases of *Lattin v. McCarty*³ and *Remington Paper Co. v. O'Dougherty*⁴ have been cited to support the claim that actions to remove a cloud upon title and recover possession may be joined, and that courts of equity will entertain jurisdiction to give relief in such actions. We do not think that those cases sustain such a doctrine. In both of those cases special circumstances existed outside of the legal title, and right to possession, which conferred the jurisdiction exercised. As was said by Judge Rapallo, in *Bockes v. Lansing*, with reference to *Lattin v. McCarty*, "the instrument sought to be set aside as a cloud was a deed which apparently, and without any extrinsic proof, established a title paramount to the plaintiff's, and the complaint showed that the defendant had fraudulently obtained possession of the premises and claimed to own them under the deed." The action there was sustained solely upon the ground that the defendants held the legal title by virtue of a deed fraudulently obtained, and the possession by a fraudulent attornment by the tenant of the owner, and, therefore, ejectment could not have been maintained. These facts were held to give the equitable jurisdiction there exercised. In *Remington Paper Co. v. O'Dougherty*,⁵ the action was brought by a purchaser under sale upon execution before his right to a deed had matured, among other things to set aside a previous conveyance apparently paramount to the plaintiff's right upon the ground that it was forged, and also certain judgments and mortgages which it was alleged had been paid and were kept alive for fraudulent purposes.

It was held that the facts alleged constituted a case for equitable

¹ *Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. City of Buffalo*, 38 Id. 276; *Fonda v. Sage*, 43 Id. 173; *Marsh v. City of Brooklyn*, 59 Id. 280, 283.

² *Supra*. ³ 41 N. Y. 107. ⁴ 81 Id. 474. ⁵ 81 N. Y. 481.

jurisdiction, and that the court having jurisdiction for some purposes could exercise it to give the relief to which the party was entitled.

No facts are alleged in this case giving the court equitable jurisdiction, and we are of the opinion that the judgment of the court below should be reversed and a new trial ordered, with costs to abide event.

All concur.

Judgment reversed.

FROST *v.* SPITLEY.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 2, 1887.

[*Reported in 121 United States Reports 552.*]

THIS case, so far as is material to the understanding of the appeal, was a bill in equity by Martin Spitley, a citizen of Illinois, against George W. Frost and wife, citizens of Nebraska, Thomas C. Durant, a citizen of New York, and The Credit Mobilier of America, a corporation of Pennsylvania, alleging that the plaintiff was entitled to two lots of land in the city of Omaha, county of Douglas, and State of Nebraska, under a sale on execution against Frost to one John I. Redick, and a conveyance from Redick to the plaintiff, and praying for a decree quieting the plaintiff's title and ordering a conveyance to him of the legal estate. Frost and wife, by answer and cross bill, denied the validity of the sale on execution, and claimed the land as a homestead. After the completion of the pleadings between Spitley and Frost and wife, the case was referred to a master, whose report was confirmed by the Circuit Court, and a final decree was entered for Spitley on his bill against Frost and wife, their cross bill was dismissed, and they appealed to this court. Durant and the Credit Mobilier were not served with process, the record did not show publication of the notice ordered to them upon either bill, they did not appear in the cause, no decree was rendered against them, and they were not made parties to the appeal.

The material facts, as appearing by the admissions in the pleadings, the master's report, and the evidence taken in the case, were as follows:

Prior to 1866, the Credit Mobilier, in whose employ Frost was, purchased the land in question, took the title in the name of Durant, its president, and built a house upon it for the use of Frost and his family, under an agreement between the corporation and Frost, by which the title was to be conveyed to him upon a final settlement between them. Frost and his family forthwith took possession of the

land, and thenceforth occupied it as a homestead, and were in possession when this bill was filed.

On November 11, 1870, Redick, who was an attorney, and Frost made and signed the following agreement: "In consideration of \$2,500 as attorney's fees, I agree with Hon. G. W. Frost that I will bring suit and procure, through the courts or otherwise, to him a good title to the premises he, said Frost, now occupies as his residence in the city of Omaha; and in case [of] any settlement or arrangement of the suit, then said Frost is to pay in proportion only; and in case said Frost fails to procure said title at all, then the said attorney is to have a mere nominal fee for his services, to wit, \$100."

Redick accordingly, on April 29, 1871, brought a suit in equity on behalf of Frost against the Credit Mobilier and Durant in the courts of Nebraska, and in that suit on March 27, 1876, obtained a decree that upon Frost's paying to said defendants within thirty days the sum of \$302.71 remaining due from him to them, they should convey the land to him. That sum was not paid within the time fixed, Frost contending that Redick, by the agreement between them, was bound to pay it. On November 11, 1876, said defendants executed a quit-claim deed to Frost, but it was never delivered to him or recorded. Durant afterwards brought an action of ejectment for the land against Frost, which was pending until June 8, 1880, when Redick, having been made a defendant therein on the ground of his having succeeded to Frost's rights in the property under the proceedings stated below, paid that sum, with interest, and the action of ejectment was thereupon dismissed.

On June 26, 1877, Redick brought an action at law to recover his fee of \$2,500 against Frost in the Circuit Court of the United States for the District of Nebraska, in which, on July 30, 1877, he obtained a writ of attachment, on which this land was attached, and was appraised at \$6,000; on March 14, 1878, recovered judgment; and on July 1, 1878, obtained an order of sale as upon execution, on which this land was appraised, "after deducting all prior liens thereon," at \$500, the appraisers adding, "The said defendant's only interest in said property, as appears by the records of Douglas County, Neb., being that of occupancy and possession, we appraise the said interest as above"; and the marshal, on August 24, 1878, after thirty days' advertisement of "the property described in this order," sold by auction Frost's interest in these lots to Redick for \$350. Frost's solicitor, at the time of the sale, gave notice to the marshal that Frost claimed the land as his homestead, and afterwards moved the court to set aside the sale for this and other reasons. But the court, upon a hearing, confirmed the sale, and directed the marshal to execute

and deliver to Redick a deed in the usual form, which was accordingly done; and Redick, on September 8, 1880, conveyed to Spitley, the present appellee.

Mr. John L. Webster for appellants.

No appearance for appellee.

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.

The opinion of the Circuit Court proceeded upon the grounds that Frost's homestead right, as against the contract made by him with Redick in 1870, and the judgment and execution afterwards obtained by Redick on that contract, was governed by the homestead act of Nebraska of 1866, by which no consent of the wife to an alienation of the homestead was required; and that the sale on execution, confirmed by the court, cut off the right of homestead.¹ But it is unnecessary to consider the validity of either of those grounds, because, even if they are well taken, Spitley's bill cannot be maintained.

At the time of the sale on execution of Frost's interest in the land, the legal title was, and it still remains, in Durant. Although Frost, under his agreement with Durant and the corporation, and the decree which he had recovered against them, had been entitled to a deed of the land upon the payment of a certain sum of money, he had not paid the money, nor had any deed been delivered to him; so that his title, either by virtue of the agreement and decree, or by virtue of his occupation of the land as a homestead, never was anything more than an equitable title. The sale on execution against him (if valid and effectual) and the deed of the marshal passed only his equitable title to Redick; Redick's payment to Durant of the money unpaid by Frost did not divest Durant of his legal title; and Redick's subsequent conveyance to Spitley could pass no greater right than Redick had. Spitley's title, therefore, at best, is but equitable, and not legal; and Frost, and not Spitley, is in actual possession of the land.

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff.² As observed by Mr. Justice Grier in *Orton v. Smith*, "Those only who have a clear legal and equitable title to land, connected with possession, have any

¹ 5 McCrary 43.

² *Alexander v. Pendleton*, 8 Cranch 462; *Piersoll v. Elliott*, 6 Pet. 95; *Orton v. Smith*, 18 How. 263; *Crews v. Burcham*, 1 Black 352; *Ward v. Chamberlain*, 2 Black 430.

right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."¹ A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment.²

It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner, so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession.³ But no such case is presented by the record before us.

In Stark *v.* Starrs,⁴ the suit was founded on a statute of Oregon, authorizing "any person in possession" to bring the suit; the court, after observing that "his possession must be accompanied with a claim of right, legal or equitable," held that the plaintiff proved neither legal nor equitable title; and consequently the question whether an equitable title only would have been sufficient to maintain the suit was not adjudged. In Reynolds *v.* Crawfordsville Bank,⁵ the decision was based upon a statute of Indiana, under which, as construed by the Supreme Court of that State, an equitable title was sufficient either to support or to defeat the suit.⁶

A statute of Nebraska authorizes an action to be brought "by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate."⁷ By reason of that statute, a bill in equity to quiet title may be maintained in the Circuit Court of the United States for the District of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for.⁸ The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills. Under that statute, as under the general jurisdiction in equity, it is

¹ 18 How. 265.

² United States *v.* Wilson, 118 U. S. 86; Fussell *v.* Gregg, 113 U. S. 550.

³ Carroll *v.* Safford, 3 How. 441, 463; Van Wyck *v.* Knevals, 106 U. S. 360, 370; Van Brocklin *v.* Tennessee, 117 U. S. 151, 169.

⁴ 6 Wall. 402.

⁵ 112 U. S. 405.

⁶ Jefferson Railroad *v.* Oyler, 60 Indiana 383; Burt *v.* Bowles, 69 Indiana 1. See also Grissom *v.* Moore, 106 Indiana 296.

⁷ Nebraska Stat. February 24, 1873. Rev. Stat. 1873, p. 882.

⁸ Holland *v.* Challen, 110 U. S. 15, 25.

"the title," that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In *State v. Sioux City & Pacific Railroad*, the Supreme Court of Nebraska said, "Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title, in order to maintain the action."¹ And in *Holland v. Challen*, above cited, this court said, "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises."

The necessary conclusion is, that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title; he cannot maintain it for the purpose of compelling a conveyance of the legal title, because Durant, in whom that title is vested, though named as a defendant, has not been served with process or appeared in the cause; and for like reasons Frost and wife cannot maintain their cross bill.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the appellee's bill, and the appellants' cross bill, without prejudice, the appellee to pay the costs in this court and in the Circuit Court.

JOHN PARKER ET AL. *v.* JAMES S. SHANNON.

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER 26, 1887.

[*Reported in 121 Illinois Reports 452.*]

WRIT of error to the Circuit Court of DuPage County; the Hon. C. W. UPTON, Judge, presiding.

Mr. Robert Hervey for the plaintiffs in error.

Messrs. E. H. & N. E. Gary for the defendant in error.

Mr. Justice MAGRUDER delivered the opinion of the court:

This case is now before us for the second time.

After the remanding order was filed in the Circuit Court an amended bill was filed, which omitted any statement as to the mode in which complainant derived his title, or as to the character of the claim set up by defendants. The amended bill simply alleged that complainant was the owner in fee of the premises and in the possession thereof, and that defendants were giving out and pretending that John Parker was "the owner of or in some manner interested in or entitled to the possession of the said premises or some part thereof," and that, under such pretended claim, defendants were committing trespasses, etc. It also alleged, that said pretended

¹ 7 Nebraska 357, 376.

claims of the defendants operated as a cloud upon the title of complainant, and prayed that said cloud might be removed. The decree, besides the findings already mentioned, found that the claims in question did operate as a cloud, and decreed that such cloud be removed. It was rendered after default taken against the defendants below, who did not plead, answer, or demur to the amended bill, nor in any way enter their appearance, after it was filed.

The amended bill sets up no other or different claim on the part of the defendant Parker, than that which is alleged in the original bill, referred to in our former opinion. A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property, as a cloud upon the title. Such clouds upon title, as may be removed by courts of equity, are instruments or other proceedings in writing, which appear upon the records and thereby cast doubt upon the validity of the record title.¹

The second decree entered by the Circuit Court is reversed, and the cause is remanded with directions to proceed as indicated in *Shannon v. Parker*.²

Decree reversed.

DAY COMPANY *v.* THE STATE OF TEXAS.

IN THE SUPREME COURT OF TEXAS, AUSTIN TERM, 1887.

[Reported in 68 *Texas Reports* 527.]

APPEAL from Travis. Tried below before the Hon. A. S. Walker.

On the twenty-eighth day of March, 1884, John Ireland, then Governor of Texas, and William Walsh, then Commissioner of the General Land Office, issued patents to lands in Greer County amounting in all to 1,44,640 acres, on which had been located certificates issued under the act of March 15, 1881. Deeds to the land thus patented had, prior to the institution of this suit, been made to a corporation known as the Day Land and Cattle Company. This suit to cancel those patents, on the ground that they had been issued without authority of law, was brought in the District Court of Greer County, and by agreement of counsel the cause was transferred to the District Court of Travis County. Judgment for the State cancelling the patents. The numerous assignments of error referred to in the opinion indicate the character of the defense.

¹ A portion of the opinion not dealing with the question of cloud upon title has been omitted.—ED.

² 114 Ill. 192.

On the twenty-fifth of February, 1879, the following act of the Legislature was approved by the Governor:

SECTION 1. Be it enacted by the Legislature of the State of Texas, That all the vacant and unappropriated public domain embraced in the territorial limits of the county of Greer, be and the same is hereby appropriated, one-half thereof for public free schools for the education of children in Texas, without reference to race or color, and the other half for the payment of the State debt.

SEC. 2. Said lands shall be surveyed and disposed of for the purpose of carrying out the provisions of this act in such manner as may hereafter be provided by law.

SEC. 3. That an emergency and imperative public necessity exists for the immediate passage of this act, that its objects may not be defeated by delay, the same shall take effect and be in force from and after its passage.

Section 35, article 3 of the State Constitution is as follows: "Section 35. No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which public moneys are appropriated) shall contain more than one subject which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Section 33 of article 3 of the State Constitution is as follows: "Section 33. All bills for raising revenue shall originate in the House of Representatives, but the Senate may amend or reject the same, as other bills."

The first section of the act of March 15, 1881, which donated land certificates to certain persons who had served the State in a military capacity, and to the widows of certain of them, provided that they might be located as headright certificates upon any of the public domain, and patented, as in other cases.

Section 3 of the act of April 9, 1881, granting twelve hundred and eighty acres of land to persons who had been permanently disabled by reason of wounds received while in the service of the State, provided: "The certificate granted under the provisions of this act shall be located as follows, the locator shall also locate a like amount of land for the benefit of the permanent school fund before either shall be patented, and such locations shall be made on any of the public domain of Texas not reserved from location."

The title of the act of February 25, 1879, was as follows: "An act to set aside the public lands embraced within the territorial limits of the county of Greer to educational purposes and for the payment of the public debt."

Anderson & Flint, Walton, Hill & Walton, and West & McGowan
for appellant.

J. S. Hogg, Attorney-General, and John D. Templeton for appellee.

STAYTON, ASSOCIATE JUSTICE.¹ It is urged, if this be treated as a suit to remove cloud, that the petition is not sufficient, in that there is no averment that the State was in possession of the lands. The rule here invoked has doubtless been recognized by many courts exercising only an equitable jurisdiction; but it may be doubted if it can be said ever to have been a rule well established even in such tribunals. When recognized, it was upon the ground that a court of equity would refuse to act where the party seeking equitable relief had a full and adequate remedy at law. Whatever the rule may be elsewhere, the rule invoked can have no application in the courts of this State, which are not only empowered, but required in any case, to give such relief as the facts presented may authorize or require, without reference to whether the relief be such as a court of equity or a court of law may give. In the same case legal and equitable relief may be given.²

It is also urged that, if the patents are void, there is no necessity for relief; and, as a court will not do a useless thing, therefore it will not cancel the patents. As said by a distinguished author, this rule "leads to the strange scene, almost daily witnessed in the courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested; and of judges deciding that the court cannot interfere, because the deed or other instrument is void; while, from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value; and the judge himself, who thus repeats the rule, would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice or expediency."³

The rule insisted upon proceeds, not upon the theory, that the court has not power to remove cloud from title by the cancellation of an instrument which evidences the adverse claim, even though it be void, but upon the theory that the court refuses to exercise the power

¹ Only so much of the opinion is given as deals with the question of cloud upon title

² *Allen v. Stephanus*, 18 Texas 659; *Magee v. Chadoin*, 44 Texas 488; *Grimes v. Hobson*, 46 Texas 416; *Daingerfield v. Paschal*, 20 Texas 537; *The State v. Snyder*, 66 Texas 687; *Thompson v. Locke*, 66 Texas 383.

³ 3 Pomeroy's Equity 1399.

it has, when it clearly appears that its exercise can accomplish no useful purpose; and that, by its refusal to act, the person who calls upon it to exercise its power will suffer no injury by its refusal to do so. If such a rule as is insisted upon can have just application in any case, it would seem to be only in a case in which, from the face of the paper, which is the basis of the claim asserted to be a cloud upon title, no man of ordinary intelligence would, in acting in relation to the subject-matter of controversy, be influenced by the claim asserted to be void, for it is only in such case that injury would not result from even a void claim.

The rule thus limited would, however, be too uncertain to furnish the basis for judicial action in granting or refusing relief, and we are of the opinion that the better rule is that, notwithstanding an instrument may be void upon its face, a court has power, which it must exercise, not only to declare the instrument void, but to cancel it where a defendant asserts claim under it.

A defendant who asserts claim even under an instrument void on its face, cannot be heard to say that it has not such semblance of validity as to create a cloud upon the title to property which it professes to convey, that will prejudice the right of the real owner if it be not removed. He cannot be heard to say that others will not attach to it the same degree of faith and credit as a title-bearing instrument, which he in good faith gives to it, and that, to the extent of the doubt or cloud thus cast upon the real title, its holder is injured, or is likely to be injured.

The answer of the defendant was filed before the exceptions were acted upon, and must be considered in connection with the petition in determining whether the exceptions were properly sustained.

The petition alleges that the land belongs to the State, and that the defendant claims them through patents issued by the Governor of the State and the Commissioner of the General Land Office, and it sets out the authority under which these officers claimed the power to pass title from the State to the patentees, and assumes that, from the facts stated, those officers had no power to issue the patents which are alleged to be void for this reason.

The defendant does not disclaim; on the contrary, relying upon the same things alleged by the State as the basis of the power which the Governor and Commissioner assumed to exercise, it claims that those conferred the power, and that the patents are valid, and in support of their propositions they file in this court an elaborate brief, marked for careful preparation and learning. Thus standing the case, the court had the power to declare the law arising upon these facts. Such power existing, it would not be exercised for the sole purpose

of declaring what the law of the case abstractly was; for this is not the purpose for which courts are created. It then became the duty of the court to determine and adjudicate the rights of the parties, and to give such relief to the party, in whose favor the adjudication was, as would protect from the injuries which it was the purpose of the suit to avoid. The statute declares that "the judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."¹



BROOKING v. MAUDSLAY, SON & FIELD.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,
MARCH 1, 5, 21, 1888.

[*Reported in Law Reports, 38 Chancery Division, 636.*]

THIS was an action by Marmaduke Hart Brooking, on behalf of himself and all other the underwriters on a policy of insurance, dated the 15th of February, 1884, on machinery carried by the steamship *Elephant*, on a voyage from London to Portsmouth, against the insurers, Messrs. Maudslay, Son & Field; and by the re-amended statement of claim the plaintiff asked a declaration that the said policy was void, and that it might be delivered up to be cancelled; or, alternatively, a declaration that the policy is not binding on the plaintiff and the others on whose behalf he sued, and that they and he were and are discharged from all liability for loss on the voyage; and an injunction restraining the defendants from taking any proceedings on the policy.

The defendants are engineers, carrying on business at Lambeth. In January, 1884, they were desirous of procuring certain machinery, which they had made for *L'Imperieuse*, one of Her Majesty's ships, to be conveyed from London to Portsmouth; and for this purpose they entered into a charter-party, dated the 8th of January, 1884, with one Scott, the owner of the steamship *Elephant*, whereby it was agreed that the machinery in question, which weighed about 867 tons, should be carried by that vessel from Millwall Dock to Portsmouth Dockyard in consideration of a lump sum of £600 as freight. The machinery was to be loaded, stowed, and discharged by the defendants, and was to be carried in two voyages, if the vessel could take all, the owner having the option of making a third voyage or supplying another ves-

¹ Rev. Stats., art. 1335.

sel to take the balance, if any. The vessel, loaded with 422 tons of the machinery, left Millwall Dock on the 28th of January, 1884, and reached Portsmouth in safety on the 3d of February. On the 14th of the same month she again set sail from Millwall Dock, carrying the rest of the machinery, but on this occasion was lost with all hands on board.

On the 25th of January the defendants had effected an insurance on the machinery which constituted the cargo on the second voyage to the amount of £30,000, and on the 13th of February the amount was increased to £40,000. Slips were initialled by the underwriters on those days, and the policy in question was issued in pursuance of these slips, and was dated the 15th of February, and included the whole £40,000. The risk included "risk of barges, lighters, etc., from assured premises and while waiting shipment on land or water." Upon the occurrence of the loss some of the underwriters paid, but a large majority disputed their liability. An inquiry into the circumstances attending the loss of the vessel took place in the Wreck Commissioner's Court, and the finding on that inquiry was given on the 14th of May. The Commissioner found that the *Elephant* had been sent to sea in an unseaworthy condition, and that Scott, the owner, and he alone, was responsible for the manner in which the ship went to sea. The defendants, upon this, applied to the underwriters to pay, and a few did so, but a large majority still refused to pay; and on the 23d of May the present action was brought.

The original statement of claim was delivered on the 24th of May, and alleged that, by reason of the weight of the machinery, the mode of stowage, the weight intended to be carried on the deck, and the fact that part of the machinery would be carried in the hatchway, rendering it impossible to put on the hatches, the risk was of a special and dangerous character, as the defendants and their agents well knew or ought to have known; that they failed to communicate these facts to the plaintiff; and (paragraph 4) that the vessel, with the machinery on board, set sail "in a grossly unseaworthy state"; and he claimed a declaration that the policy was void, and that it might be delivered up to be cancelled. The defendants, in the first instance, met this by an application to strike out paragraph 4, relating to unseaworthiness, and upon this application an order was made giving the plaintiff liberty to amend. The plaintiff accordingly amended by alleging that the policy was void, "or the underwriters discharged from liability thereunder," retaining his former allegation that "the defendants nevertheless claim and intend to make use of the same and treat it as a valid and existing contract on the part of the plaintiff and those on whose behalf he sues," and adding a claim for the alternative declara-

tion mentioned above. To this amended statement of claim the defendants put in a defense in which (as also amended) they admitted that the ship was unseaworthy, but stated that the unseaworthiness was owing to her being overladen, and was not known to them until after the ship had been lost, and they wholly denied the allegations of concealment and non-communication of facts. And they further alleged that the overloading did not take place until after the slip for the policy of insurance was initialled, so that the question of overloading did not arise until after the contract was entered into; and they asserted that the policy was valid and had not been avoided; and, further, that although the vessel was unseaworthy, yet, according to the universal practice that had hitherto prevailed with all the leading underwriters at Lloyd's, the plaintiff and the other underwriters of the policy were bound in honor, though not in law, to pay, but the defendants denied that they had claimed or intended to deal with or make use of the policy as a valid existing policy, or that they had ever threatened legal proceedings. The plaintiff then put in a reply in which he joined issue generally, but stated that he "did not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendants of material facts." The defendants objected to this pleading, and upon their motion, in July, 1886, Mr. Justice Kay ordered that all allegations of concealment or non-communication of material facts should be struck out as scandalous and embarrassing. The plaintiff's claim was accordingly again amended, and the action came on for trial.

Sir Henry James, Q.C., Hastings, Q.C., Gorell Barnes, Q.C., and Hurst for the plaintiff.

Sir R. Webster, A.G., Byrne, Q.C., and Bray for the defendants.

1888, March 21. STIRLING, J. (after stating the facts of the case and reading the pleadings, continued):

On these pleadings the action has been brought to trial. At the trial it was admitted by counsel for the plaintiff that the policy is not void, and that judgment for cancellation cannot be given; but they insisted that they were entitled to relief in accordance with the alternative prayer in the statement of claim. The defendants, on the other hand, admit that the unseaworthiness of the *Elephant* constitutes a good defense to any action at law on the policy; but they deny the right of the plaintiff to the relief claimed by him or any other relief. This question formed the main subject of argument before me. A correspondence between the legal advisers of the plaintiff and defendants was, however, put in evidence, from which it appears that the real issue between the underwriters and the defendants is one which is not and cannot be raised in this action. It is of

this nature. It is the practice of underwriters, who may have a good defense to an action on a policy founded on the unseaworthiness of a vessel, to pay insurers who are "innocent shippers." Whatever may have been the case at first, it is not now asserted by the underwriters that the members of the defendants' firm are personally to blame for the condition in which the vessel left for sea; but it appears to be alleged that through their servants or agents they were in some way implicated in the unseaworthiness, and the real question between them is whether Messrs. Maudslay are innocent shippers and entitled to the benefit of the practice to which I have referred. This issue cannot be tried in this action, nor, indeed, so far as I can see, by any legal tribunal whatever. It must be decided, if at all, by some court of honor to be selected by the parties interested. Most certainly it cannot be affected one way or the other by the judgment I am about to pronounce. My decision depends upon the dry and technical (though not unimportant) question whether (regard being had to the rules which govern the procedure of the court) the plaintiff is entitled to the relief for which he asks at the bar.

The case stands thus: The defendants are entitled to the benefit of a policy of insurance on which they may sue at law. The plaintiff alleges and the defendants admit by the pleadings that the plaintiff has a valid defense to any action which may be brought at law on the policy. The defendants say that they have not threatened legal proceedings, but they have declined to give an undertaking not to take any, and they abstain from stating whether it is their intention to take proceedings or not. Under these circumstances, can the underwriters bring the defendants before a court of equity and obtain a declaration and injunction according to the second alternative of the statement of claim? If the policy were liable to be completely avoided, as, for example, if it had been obtained by misrepresentation, a court of equity would have jurisdiction to direct the delivery up and cancellation of the instrument. This is clearly shown by the case of *Duncan v. Worrall*.¹ On the other hand, where the policy cannot be so avoided, but there is a good legal defense to an action upon it (as, for example, deviation) a court of equity cannot make a decree for cancellation; see *Thornton v. Knight*,² where the Vice-Chancellor in a few words draws the distinction between the two classes of cases. He says: "If the policy, though good on the face of it, had been proved to be void on the ground that the representation made by the insurers, when they effected it, as to the seaworthiness of the ship, was false, I could have interfered; for then a case of fraud would have been made out against the insurers. But I cannot

¹ 10 Price 31.

² 16 Sim. 509, 510.

interfere on the mere ground of deviation, unless this court has a concurrent jurisdiction with a court of law, in all cases in which relief is sought against instruments like the one in question. That, however, is not so; and, therefore, I shall dismiss the bill with costs." In that case, however, an action at law had been brought, and the decision does not cover the question before me—viz., whether the court can make a declaration that the underwriters are not liable on the policy, and grant an injunction against future proceedings at law.

Prior to the Judicature Acts, a plaintiff coming into equity to restrain proceedings at law, was bound to show some equitable ground for relief. He had not, as a rule, a right to come into a court of equity to restrain proceedings in a court of law if he had a good defense at law. If authority for this is wanted I may refer to the cases of Hardinge *v.* Webster¹ and Kemp *v.* Tucker.² The present plaintiff comes before the court without alleging any case which would give a court of equity jurisdiction, either exclusive or concurrent with the courts of law. The sole ground on which he claims the relief is that, although there is a good legal defense to any claim by the defendants against him, that defense depends on extrinsic facts, the evidence of which may not be forthcoming at all times and under all circumstances. The existence of such evidence is not alleged in the statement of claim nor proved at the trial; if it had been, it would seem to me the appropriate remedy would be found in an action for the perpetuation of testimony rather than in proceedings such as the present. Upon this I may refer to two authorities from which (as it seems to me) inferences may be drawn adverse to the view of the law contended for by the plaintiffs. In the case of Angell *v.* Angell³ Sir John Leach lays down the law as to the cases in which the jurisdiction of courts of equity to perpetuate testimony is exercised. He says:⁴ "If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can, by no means, bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he is himself in possession) there courts of equity will entertain such a suit; for, otherwise, the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event." The general principle being that a person who is in a position to institute proceedings cannot file a bill to perpetuate testimony, it is nevertheless laid down

¹ 1 Dr. & Sm. 101.

² Law Rep. 8 Ch. 369.

³ 1 S. & S. 83.

⁴ Ibid. 89.

that a party in possession may file such a bill. Obviously it did not occur to Sir John Leach that a person in possession of real estate, and threatened with an action of ejectment to which he had a good legal defense, might file a bill in Chancery to establish that defense and obtain an injunction to restrain proceedings at law. The other case is Earl Spencer *v.* Peek,¹ where Lord Romilly decided that the pendency of a suit in equity in which the issue could be tried was an answer to a bill to perpetuate testimony. His Lordship said: "The principle which is laid down in all the cases is, that if the matter to which the required testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses are resident in England, a demurrer will hold. . . . It is contended that this can only apply where the plaintiff in a bill for the perpetuation of testimony can himself bring an action and have the matter tried; but I apprehend that to be a mistake, and that if the matter is in the course of investigation in a suit, that removes the exact objection. It is stated by Mr. Justice Story, laying down the same rule, that where a right of action lies in the defendant, although the matter might be investigated in a court of justice, still the bill would lie; and I assent to that view of the case. What Mr. Justice Story means is, that where the right is in the other party to bring an action against the plaintiff who files the bill to perpetuate testimony, he may maintain such a bill if no such action is brought." It could not, therefore, have been his opinion that a person threatened with proceedings at law, to which he had a good legal defense, could bring a suit in equity to restrain them, on the ground that the evidence in support of his case might be lost. On principle it is difficult to see why the defendants, having a claim which they may assert in a court of law at any time within the period fixed by the Statute of Limitations, should be compelled to try the issue on which the validity of that claim depends in a court of equity, and at another time than that which they may select as the most convenient for themselves. The authorities mainly relied on by the plaintiff were the judgment of Lord Eldon in *Bromley v. Holland*,² and certain passages in the judgments of Lord Cottenham in *Simpson v. Howden*,³ and of Lord Selborne in *Hoare v. Bremridge*.⁴ These authorities are, no doubt, of great value, but they relate to the cancellation of void or voidable instruments (as is shown by the case of *Thornton v. Knight*,⁵ already cited), and do not necessarily apply to cases where, as here, the instrument is not void or voidable, and relief by way of cancellation cannot be given. In *Cooper v. Joel*⁶ the defendants claimed the benefit of a guarantee, which was held by Lord

¹ Law Rep. 3 Eq. 415, 420.

² 7 Ves. 3.

³ 3 My. & Cr. 97, 102.

⁴ Law Rep. 8 Ch. 22, 26.

⁵ 16 Sim. 509.

⁶ 27 Beav. 317.

Romilly, Master of the Rolls, to be invalid, and as the invalidity did not appear on the face of it an order was made for cancellation. The principle on which this decision was based is thus stated: "If a legal instrument has stated on the face of it the defect which makes it impossible to sue at law, this court will not interfere; but, if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person to proceed at law upon it, or if there be a good legal defense, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument from loss of the evidence necessary for his defense at law to be unable to make available, then this court will interfere and order the instrument to be delivered up to be cancelled." This appears to be an authority in favor of the plaintiff. The case, however, was brought on appeal before the Lord Chancellor, Lord Campbell,¹ and his judgment appears to me to amount to a reversal of the decision of the Master of the Rolls, so far as it is based upon any principle applicable to the present case, and that, too, although cancellation, and not an injunction, was the remedy sought. If, in the present case, the argument on behalf of the plaintiff is well founded, I cannot see why any person liable to have a claim made against him at law, and having a good defense to it, may not bring the matter before a court of equity in the same way as the present plaintiff does; and, indeed, the case was put as high as this by the learned counsel of the plaintiff in the course of his reply. Such a right appears to be negatived by the words of the Lord Chancellor, Lord Campbell, in *Cooper v. Joel*.² He said that the argument amounted to this, that a court of equity would interfere to restrain an action whenever the action ought not to be brought, and proceeded:³ "If that was the rule, hardly any dispute could arise upon a contract"—or, indeed, as to any other legal right "which might not be drawn into a court of equity." In my opinion no such rule exists. In my judgment, therefore, the claims of the plaintiff are not warranted by principle or supported by authority. I think that this action is in the nature of an experiment, and as the experiment fails, I see no reason why the costs should not follow the event.

¹ See *Cooper v. Joel*, 1 D. F. & J. 240.

² 1 D. F. & J. 240.

³ 1 D. F. & J. 245.

RICHARD CONTEE ET AL. *v.* EVAN LYONS ET AL.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, JUNE
23, 1890.

[*Reported in 19 District of Columbia Reports 207.*]

HEARING in General Term in the first instance of a demurrer to a bill of review, the original bill having been filed to remove a cloud from the title to real estate.

The facts are stated in the opinion.

Messrs. E. Totten, A. A. Birney, Wm. A. McKenney, and D. R. Magruder for complainants.

Messrs. C. M. Matthews and John Ridout for defendants.

Mr. Justice Cox delivered the opinion of the court:

In this case the bill was filed to review a decree rendered by Judge Merrick in an original cause in which parties are just reversed—in which the present complainants were defendants and these defendants were complainants. That was a bill *quia timet*, in which the complainants sought to have an alleged cloud upon their title removed, the cloud consisting of the record title of the present complainants—the defendants in that suit. In order to make the case intelligible, it will be necessary to go back some years in the history of the title.

In 1839, John Contee, of Prince Georges County, Maryland, died seized of a tract of land in this district, known as part of "Pretty Prospect," now on the outskirts of the city of Washington. He had made a will in which he directed his executors to sell certain property in Maryland and this property, and apply the proceeds to the payment of his debts. The executors named in the will declined to serve. Thereupon his eldest son and his widow applied to Chancellor Bland to appoint a new trustee to carry out the trusts of the will. Very strangely, Chancellor Bland, without summoning anybody interested in the cause to appear, without any hearing, in a summary way, on the same day on which application was made, signed a decree appointing John Johnson trustee, and vesting the title of the property in the District of Columbia in him for the purpose of carrying out the trusts of this will. John Johnson sold the property to Evan Lyons in 1841 and executed a deed. Mr. Lyons went into possession, and he and those claiming under him have held possession ever since. One of these parties recently undertook to sell a portion of this land and was met with the objection, by the real estate title company—a very obvious objection—that Chancellor Bland had no jurisdiction to appoint a trustee and vest the title to real estate in the District of Columbia in him, and, therefore, Mr. Lyons had received no title and

had none to convey. Thereupon, the complainants, who are all claimants under Mr. Lyons, filed a bill *quia timet* against the heirs of Contee, alleging the record title of the Contees to be a cloud upon their title under this decree of Chancellor Bland and the sale of John Johnson, and asking that the title of said defendants, "as heirs-at-law and devisees of John Contee, and heirs of Ann L. Contee in and to part of "Pretty Prospect," etc., may be declared divested, and that a trustee may be appointed to convey the land to the complainants according to their proper interests and proportions.

There was an order of publication against the defendants in that case, who were all non-residents. The bill was taken *pro confesso* against them, and a commission was issued to appoint a guardian *ad litem* to the infant defendants, who filed an answer, and testimony was taken as against the minors, and thereupon Justice Merrick, on September 26, 1887, passed a decree that the property described in said proceedings in this cause "be, and the same is hereby, divested," and that "Charles M. Matthews, as trustee under a deed of trust from Evan Lyons, shall hold subject to the provisions of said trust the following described property, etc., and that he be, and hereby is, appointed trustee to make conveyances to the complainants."

The present bill is filed by the heirs of Contee to review that decree on the ground of error, and the grounds alleged in the bill are:

First. Because said decree was founded upon certain proceedings in the High Court of Chancery of Maryland which were ineffectual to divest the title of your complainants, as heirs-at-law and devisees of their ancestor, John Contee.

Second. That said High Court of Chancery was without jurisdiction to direct a sale of said real estate.

Third. Because the sale of the said real estate so made as set forth in the said bill of complaint of the defendants herein and in the exhibits filed herewith, appears upon the record and proceedings in said cause to have been made without authority of law, and is null and void.

Fourth. Because no decree should have been passed in said cause, but said cause should have been dismissed.

Fifth. Because said decree of September 26, 1887, is unauthorized in law upon the face of said bill.

Sixth. These complainants are grievously and irrevocably injured by said decree, are without remedy of law, and should have relief at the hands of this court.

Four of the defendants filed a demurrer for the following causes:

First. That the court had jurisdiction and authority to pass the decree of September 26, 1887.

Second. That the bill in this cause is bad in form, because the

evidence in Equity Cause No. 10,507, Docket 27, is made part of said bill.

Third. That the decree of September 26, 1887, was not based upon the proceedings in the High Court of Chancery of the State of Maryland, and, for divers other causes and imperfections, the defendants claim they should not be compelled to further answer said bill.

The demurrer was certified to this court to be heard in the first instance. It is proper to notice, first, that one of the grounds of the demurrer to the present bill is one of form entirely; that is, that the bill in this cause is bad in form, "because the evidence in Equity Cause No. 10,507 is made part of said bill." It is perfectly well settled in law that a bill of review, unless on the ground of newly discovered evidence, must proceed upon error in the record or proceedings of the court in the original cause, but not upon error of fact, not upon the ground of any mistake in the conclusions of the court as to evidence. I am not prepared to say that if the evidence in the original cause is merely recited as part of the proceedings, that would be the subject for demurrer, but if any relief is sought upon the ground that the evidence has not established the fact upon which the original cause depends, that would be plainly a cause for a demurrer. In this case the cause alleged for demurrer is evidently founded upon mistake of fact. The printed record also embodied the mistake. The printed record says: "The depositions taken are Exhibit G of this cause." Now, when we come to look at the original bill, we find that in reciting the proceedings in the original cause, it recites the order of reference to an examiner to take depositions, but makes no reference whatever to the depositions themselves, and the order referring the cause to an examiner is really Exhibit G and not the depositions, so that the depositions are not made a part of this cause by the bill of review, and this cause alleged by demurrer is, therefore, erroneous in point of fact. Even if the depositions had been made a part of this bill, it would not be conclusively a ground for demurrer. In the case of *Buffington v. Harvey*¹ the court says:

"It was error, therefore, to insert in the bill, as was done in this case, the evidence taken in the original cause." (In this case, too, the error alleged was error of fact in the original decree.)

"Had this error been specially assigned, the demurrer might have been sustained on that ground alone, or the evidence might have been stricken out of the bill as surplusage on motion."

That is the law, also, in this case, and the evidence could have been stricken out, were there any necessity for it, but there is not. That ground of demurrer, therefore, is not tenable.

¹ 95 U. S. 99.

Now, we come back to the broad question presented on the face of this bill, and the demurrer thereto, whether the original case presented proper ground for a decree to remove a cloud from title. It is conceded, by all hands, that the Chancellor of Maryland had no jurisdiction to appoint a trustee to convey property in this District, and his decree and the conveyance of the trustee appointed by him are as complete nullities as if an executor, without any power to sell, or an administrator, had undertaken or should undertake to sell real estate of the decedent for the payment of his debts. Consequently, Mr. Lyons' title rests upon nothing in the world but adversary possession. The presumption is, this is sufficient to have given him, and those claiming under him, not only a valid defense to an action in ejectment, but a good title on which to sustain an ejectment. It is not absolutely certain, because there may have been parties at that time under coverture, whose disability may not have been yet removed. The case of disability of nonage would have been removed long since. But we will assume, for the purpose of this case, that Lyons and those claiming under him had adversary possession sufficiently long to amount to a perfect defense against an action of ejectment, and a title under which he might have recovered against any other party. The question is, whether that is a ground upon which relief may be given against the original owners. The very term, "to quiet a title," imports that there is something disturbing in it. In point of fact, it appears in this case that the heirs of Contee never agitated their title at all or made any claim whatever, the title simply lying dormant, not being asserted by anybody. As I said, the general implication from the term, "to quiet a title," is that there is something disturbing in it, and that occurs when some recent title has been acquired, spurious title it may be, though specious, as where a man gets a tax title, apparently good but intrinsically bad. In this case, the real owner has a right to come into court and say that is a cloud upon his prior title and ask for relief. So, in this case, before Mr. Lyons went into possession, these Contee heirs being in possession, might have filed a bill to set aside this title of Lyons as a cloud upon their title. But for complainants, who have nothing but mere adversary possession, to say that a good and valid record title of the original owners, antedating theirs by many years and which has never been asserted, but is lying dormant, is a cloud upon their title by adversary possession, really seems to be a perversion of the terms. The attitude of complainants is simply this: We have come into court and say we have had possession of the property of these defendants for a period long enough to amount to a perfect defense to an action of ejectment brought by them; but that is not satisfactory to us, because we find

it impossible to sell the property, because we are unable to present a record title, and we think therefore we ought not to be left simply to our defense, but the court ought to interfere actively for us and decree that the original owners shall be forever barred and enjoined from asserting their title; or, in other words, that they shall make a deed to us, or the court should decree their title to us, although their title was the original rightful title and ours originally a wrongful one. If in a case of that sort relief could be given, I can hardly see how it could be declined in any other case in which a party has nothing to rely upon except the Statute of Limitations. Suppose I had personal property in my possession belonging to another, for three years, which would be sufficiently long to bar an action of *réplevin*. If that rule were so, I might appeal to the court to restrain the original owner from bringing suit and to decree my title to be a perfect one. In fact, the analogy would carry us still further. I might be insolvent; my debts might all be outlawed; and I might come into court and say, "I wish to go into business, but I have a large number of debts hanging over me which destroy my credit, but these debts are outlawed and I want to have some relief besides a mere defensive one." I might ask the court to convene all my creditors in court here to avoid multiplicity of suits and get a general decree forever enjoining collection of my debts, and thus convert an equity court into a court of bankruptcy and get a discharge from my debts. The fact is, the application in this case is not one to remove a cloud upon a title, but to remedy a defect in complainants' title, and, in fact, to transfer the title of the original rightful owners to the complainants. That is the essence of an application of this kind. This same question came before this court once before in the case of *Thomas J. Fisher v. The Tucker Heirs*. That was a case in which parties had a tax title which they did not rely upon, because it was manifestly void, but they also claimed adverse possession of twenty years, and they asked a perpetual injunction against the original owners of the property. They said the title of the original owners was a cloud upon their title under adversary possession only. It happened in that case there was some doubt, on the proof, whether adversary possession was made out, and the court refused relief, but I remember very well the expression of the opinion by members of the court was, that such a case was entirely without precedent, unless it may be one case which was cited from a far distant State, in which the court had administered such relief. It is novel in this jurisdiction. It was never known in the English chancery practice or the practice of Maryland or of this court, that parties claiming by virtue of adversary possession alone could ask the court actively to extinguish the record title of the original owners. As far,

therefore, as the decree in this cause was rendered upon that ground—that is, the court undertook to extinguish the original record title as a cloud upon the title of the complainants—we think there was manifest error.

But, in the course of the argument, it has been urged that other grounds for equitable interference presented themselves on the face of the proceedings in this original cause. It was said that the will of Contee dedicated this property to the payment of his debts, and if an application had been made to the Circuit Court of this District, it would have appointed a trustee to sell this property and apply the proceeds to the payment of his debts. It is further said Mr. Lyons paid the purchase-money, and that money went to the payment of Contee's debts, and the same thing was accomplished which would have been accomplished if the proceedings had been regular and valid; and that an equity arises in favor of these complainants holding under Mr. Lyons, which makes them virtually owners of the property, and the heirs of Contee the holders of the legal title in trust for their benefit. There would be a great deal of force in this if the proper averments were contained in this bill, but the bill does not contain a single averment which it is necessary to set forth in order to present the supposed case. It nowhere appears on this bill that it was necessary to sell the property for the payment of Contee's debts. It nowhere appears that this money ever went to the payment of Contee's debts. At the conclusion of the bill, and as a conclusion of law, the complainants state that they "are advised that by reason of the sale to the said Evan Lyons, senior, and the payment of said sum of \$1,250, its receipt and application by said John Johnson, trustee, for the purpose of said decree, the said Evan Lyons, senior, was the equitable owner of the real estate thus sold and afterwards conveyed to him"; that is to say, by reason of facts that have not been alleged at all in the bill, there was an equity in Mr. Lyons' favor. There are no averments that the money was ever applied by the trustee for the purpose of the payment of Contee's debts; no averments, as I repeat, that it ever became necessary to sell this property for the payment of his debts, and, therefore, we think that on the face of the original bill there does not appear any equitable ground for the relief that was granted, such as was claimed in argument. Whether such a case can be made, we are not now called upon to determine.

Laches of the complainants is relied upon also. Now, if they were simply asserting their original title to this property, of course the defense of laches would be very proper, but there is no laches here with reference to the decree. The bill is filed to impeach that decree within the time required by law. There is no laches as to that, and

the objection of laches as to the assertion of their original title does not, therefore, apply to this issue.

We are satisfied, therefore, that the demurrer to this bill must be overruled.

ASHURST v. MCKENZIE.

IN THE SUPREME COURT OF ALABAMA, NOVEMBER TERM, 1890.

[*Reported in 92 Alabama Reports 484.*]

APPEAL from the Chancery Court of Macon.

Heard before the Hon. John A. Foster.

In 1844, John McKenzie owned certain lands in Macon County, Alabama. In said year he gave a portion of that land to his daughter, Mary S. Wright, but did not execute a deed of gift. In 1862, one Thompson purchased this Wright land on time, and received a bond for title from John McKenzie and wife. In 1864, R. T. Ashurst, the appellant in this court and defendant in the court below, bought from Thompson, and took possession of the land. In 1869, said R. T. Ashurst received a deed from John McKenzie and wife, and Mary S. Wright and her husband, after he had paid the purchase-money for said land. In 1866, John McKenzie sold the remainder of said land to R. R. Ashurst, son of R. T. Ashurst, took notes for the deferred payments on the purchase-money, and put the purchaser in possession. Subsequently he transferred the purchase-money notes given by said R. R. Ashurst to P. R. McKenzie, one of the complainants in the court below, and appellees here. Upon default in the payment of these notes, said P. R. McKenzie filed his bill in chancery against said R. R. Ashurst, to enforce his vendor's lien under said notes. A decree was rendered, the lands sold thereunder, and in January, 1876, a deed was made to Mrs. E. A. McKenzie, who was the purchaser. In 1877, Mrs. E. A. McKenzie sold these lands to Mrs. E. C. McKenzie, wife of P. R. McKenzie, and mother of the other complainants. Mrs. E. C. McKenzie died in 1877, intestate. Several years after these transactions, it was discovered that R. T. Ashurst and his son, R. R. Ashurst, had, during their occupancy of the respective portions of said land, destroyed and obliterated the original boundary line between said tracts of land; and that said R. T. Ashurst was claiming about ten acres of the land which rightfully belonged to said P. R. McKenzie and the children of him and Mrs. E. C. McKenzie.

As the bill avers, it being impossible to amicably adjust the con-

troversy about the boundary line, and the courts having been frequently resorted to, without any effect, for the purpose of redressing wrongs and counter-wrongs, the said P. R. McKenzie and his and Mrs. E. C. McKenzie's children filed the present bill against the appellant, R. T. Ashurst; and prayed to have the cloud created by defendant's claim to said portion of the land, removed, to have the titles quieted, to have the disputed boundary line established, and to enjoin the trespasses committed by the defendant and his tenants. The defendant demurred to the bill, and assigned, among other grounds, that the complainants had an adequate remedy at law; and (5) "That it was apparent from the bill that its purpose was to have a court of equity settle a disputed boundary line." The Chancellor overruled each ground of demurrer; and the defendant then filed his answer. The facts as averred in said answer are sufficiently shown in the opinion of this court.

Upon final hearing, on pleadings and proof, the Chancellor decreed that the complainants were entitled to the relief prayed; and ordered the temporary injunction to be made perpetual, and established a boundary line between the lands of the complainants and defendant.

The defendant brings this appeal, and assigns the overruling of his demurrs, and the final decree as error.

S. B. Paine for appellant.

P. B. McKenzie contra.

McCLELLAN, J. There are suggestions in the present bill looking to relief by way of quieting, and removing a cloud from, complainants' title to the land in controversy. But neither the averments nor proof are sufficient to authorize such relief.

1. With respect to bills to quiet titles we have no such statutory provisions as exist in some of the States under which such bills have come to be an ordinary mode of trying disputed titles, and the jurisdiction of chancery can be invoked to this end only upon the general principles of equity jurisprudence, which afford this remedy to a complainant "in possession holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons assert equitable titles against a plaintiff in possession holding the legal or an equitable title."¹ None of these necessary facts are in this case, and the suggestion as to relief by way of quieting titles may be dismissed from further consideration.

2. As to removing a cloud from complainant's title, the suggestion is equally lacking in averment and proof. There is no allegation or evidence of any muniment of title, proceeding, written contract, or

¹ 3 Pom. Eq. Jur. § 1396.

paper showing any color of title in the defendant, which could cast a shadow on the title of complainants to any part of the land; there is no overlapping of description in the muniments held by either. The land of complainants and defendant join. The line which separates them is in dispute and is to be determined by evidence *aliunde*. Each admits that the other has title up to his line wherever it may be, and the title papers of neither fix its precise location. So that there is no paper, the existence of which clouds the title of either party, and nothing could be delivered up and cancelled under the decree of the court undertaking to remove a cloud. That suggestion may also be summarily dismissed. The real purposes of the bill appear to be two: ¹ *first*, to establish by a decree of the court a disputed boundary line between the coterminous proprietors; and, *second*, to enjoin the defendant from trespassing upon any part of the land thus found to belong to complainants.

LYTLE *v.* SANDEFUR.

IN THE SUPREME COURT OF ALABAMA, NOVEMBER TERM, 1890.

[Reported in 93 Alabama Reports 396.]

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. Thos. Cobbs.

Wm. M. Brooks for appellants.

Hewitt, Walker & Porter, contra.

MCCLELLAN, J. The pith of the present bill may be stated as follows: James L. Sandefur died seized in fee of certain six acres of land. It was not his homestead, nor did it constitute any part of his last dwelling-place. His estate owed no debts, and no administration was had, or was necessary. His heirs were his children, and they are complainants in this bill. M. A. Sandefur was his wife and his widow, and is also a complainant. Dower had never been allotted to her, but it seems she now lives with the heirs of her husband, who are also her children, on this land. Subsequent to her husband's death, she purchased an adjoining parcel of land containing fourteen acres, from Messrs. Sloss, taking their quitclaim deed. The description in this deed, by mutual mistake, covers also the six-acre parcel referred to above. She in turn undertook to convey this fourteen-acre parcel to one Dansby, but, being ignorant of the misdescription in Sloss' deed, followed it in the deed to Dansby, and he made the same mis-

¹ The opinion of the court on these questions has been omitted.—ED.

take in his conveyance to the appellant, Mary J. Lytle. It is alleged that it was the purpose of all these grantors to convey only the fourteen-acre parcel, and that the several grantees contracted for and expected to be invested with the title to that tract only. Mary J. Lytle instituted, and at the time of bill filed was prosecuting, an action of ejectment in the City Court of Birmingham against M. A. Sandefur, to recover both of said parcels of land. The purpose of the bill is to correct the mistake of description in the several deeds, to remove the cloud thereby cast upon complainants' title, and to enjoin the action at law.

The six-acre parcel of land descended to the children and heirs-at-law of James L. Sandefur, deceased, and the title thereto in its entirety became vested, and is now vested, in them. M. A. Sandefur, on the facts alleged, has not, and has never had, any right, interest, or estate in that land, which was the subject of a conveyance by her. Her right of action for the allotment to her in severalty of one-third of that tract is not such an interest, estate, or title as could be assigned or conveyed by her at law, so as to invest her assignee or grantee with any title or right that could be asserted in a legal forum against the heirs of her husband. Her attempted conveyance to the contrary notwithstanding, they have an adequate remedy at law, as well in the defense as in the prosecution of actions of ejectment, to maintain their possession, or to recover the land from those in possession under the widow's conveyance.¹

It is true, on the other hand, that the assignment and transfer by the widow of her right to dower allotment will be supported and effectuated in a proper case in equity; and her deed purporting to convey the land to which the dower right pertains will in such case be given operation as a transfer to the grantee of her right of action in respect of the dower interest.² But such transfer, any more in equity than at law, cannot affect the title or rights of the heirs in any sense, or to any extent of which courts can take cognizance. The widow has the absolute right to have one-third of the lands of which her husband died seized allotted to her in severalty; and it can be a matter of no consequence, in legal contemplation, to the heirs, whether she asserts this right at law, or her assignee asserts it in equity. In either event, the result is the same to the holders of the fee. Whether Mrs.

¹ 2 Scrib. Dower, pp. 27-35; *Weaver v. Crenshaw*, 6 Ala. 873; *Smith v. Smith*, 13 Ala. 329; *Cook v. Webb*, 18 Ala. 810; *Wallace v. Hall*, 19 Ala. 367; *Saltmarsh v. Smith*, 32 Ala. 404; *Barber v. Williams*, 74 Ala. 331; *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

² 2 Scrib. Dower, pp. 45 *et seq.*; authorities *supra*; *Reeves v. Brooks*, 80 Ala. 26.

Sandefur's right to have dower allotted to her out of the six-acre parcel has been equitably assigned to the appellant or not ; and whether her deed purporting to convey that parcel, and hence *prima facie* operating an equitable transfer of this right lying in action, was intended to embrace that land, or, as is alleged, included it therein through the mutual inadvertence and mistake of the parties thereto, it is certain that the interests of the heirs will not be prejudiced in any forum by upholding the alleged misdescription, or conserved by the rectification of the alleged mistake. So far, therefore, as the bill is grounded on the misdescription of the land in the deeds to and from M. A. Sandefur and from Dansby to Mary J. Lytle, and as relief is sought by correction of the mistake in the description and injunction of the pending suit at law against M. A. Sandefur, the heirs of James L. Sandefur are not necessary or proper parties.

For purposes of relief by way of removing a cloud from the title of the complainants, the bill is wholly lacking in equity. What we have already said will suffice to indicate the grounds of our opinion, that Mrs. Sandefur had no title, legal or equitable, in the land, but only a right of action in respect to it. It is not conceivable, in the nature of things, that any state of facts in regard to the title, any character of muniments evidencing *prima facie* title in others, could be said in any sense to shade and obscure that which has no existence.

The title of the other complainants, which, according to the theory of the bill, is clouded by reason of the fact that the land in question was inadvertently embraced in the deeds of the Slosses, Mrs. Sandefur, and Dansby, respectively, came to them by descent from their father, James L. Sandefur. It is alleged that he was seized in fee of the land at the time of his death. All of the deeds which are now sought to be cancelled, on the ground that they constitute a cloud on this title, were executed subsequent to his death. There is no pretence that any person who succeeded in any way to the title of James L. is a party to any one of these deeds, or nominally bound by them. There is no pretence that any party to any of these deeds had or has any title or color of title as against the title of said heirs. On this state of averment, these apparent muniments do not constitute a cloud on the title of the heirs. The test as laid down by this court is this, as applied to the present case : Would these heirs, in an action of ejectment founded upon either of said deeds, be required to offer evidence to defeat a recovery ? If the proof would be unnecessary, no shade would be cast on their title by the presence of the deed. If the action would fall by its own weight, without proof in rebuttal, no occasion could exist for equitable interposition.¹ It is said in this case : "A

¹ *Rea v. Lonstreet*, 54 Ala. 294.

court of equity will not interpose to prevent or remove a cloud which can only be shown to be *prima facie* a good title by leaving the complainant's title entirely out of view. It is always assumed, when the court interposes, that the title of the party complaining is affected by a hostile title *apparently good, but really defective.*" In an action based on the title supposed to be conferred by the deeds which are alleged to be a cloud on the title of the heirs, against them, the plaintiff's case would fall of its own weight, because of a failure of his proof to draw to himself the prior and superior title which vested in James L. Sandefur in life, and passed *co instanti* into the defendant's at his death. The title, in other words, is not even apparently good against the heirs, would not be admissible in defense to ejectment by them, and would fall short of establishing a *prima facie* valid claim of the title in ejectment against them, even if their own title were not adduced in evidence at all. The authorities concur to the point, that such nominal muniments can in no sense be said to constitute a cloud to the removal of which equity jurisdiction may be invoked.¹

The deed executed by Mrs. Sandefur, and by which she intended to convey and her grantee expected to acquire title to the fourteen-acre tract of land, was made to embrace, by mutual mistake, we think the bill sufficiently avers, also the six-acre parcel. While as to this parcel the paper cannot operate as a conveyance of title, since she had no title, yet she would be bound on the warranty of title it contains, and in equity, as we have seen, it will operate as an assignment of her right lying in action to have dower allotted out of that tract; and considered with reference to her warranty, and as a transfer of this right, we do not question but that she may invoke the jurisdiction of a court of equity to the correction of the mistake in description, and to the virtual cancellation of the instrument so far as it relates to that land.² Moreover, the averment of the bill is, that the action of ejectment instituted by Mary J. Lytle is prosecuted against Mrs. Sandefur for the recovery of both parcels of land. She has no desire to defend against a recovery of the larger tract, and might avoid expense by a disclaimer as to it. As to the other, the recitals of her deed would estop her to make the defense of mistake in description. If that action is allowed to proceed pending this bill, a recovery, involving costs which might not pertain to an action solely for the four-

¹ *Tyson v. Brown*, 64 Ala. 244; *Lick v. Ray*, 43 Cal. 83; *Munson v. Munson*, 28 Conn. 582; *Lehman v. Roberts*, 86 N. Y. 232; *Mitchell v. Spence*, 62 Ala. 450; *Curry v. Peebles*, 83 Ala. 225; *Fite v. Kennamer*, 90 Ala. 470; *March v. England*, 65 Ala. 275; *Borst v. Simpson*, 90 Ala. 373.

² 1 *Brick Dig.* 680 *et seq.*; 3 *Brick Dig.* 332 *et seq.*; 2 *Pom. Eq. Jur.* §§ 870 *et seq.*

teen acres, would go against her. Our opinion is, therefore, that the action of ejectment should not be allowed to proceed for the six-acre tract.

The decree of the Chancellor is not in harmony with these views. It is reversed, and a decree will be here entered sustaining all grounds of demurrer, except such as draw in question the right of Mrs. Sandefur to have the instrument reformed, so that it will not include the six acres or any part of it, and modifying the injunction. The cause is remanded, and sixty days is allowed for amendment of the bill in accordance with this opinion.

BENJAMIN F. G. LINNELL *v.* ALEXANDER R. BATTEY
ET AL.

IN THE SUPREME COURT OF RHODE ISLAND, FEBRUARY 7, 1891.

[Reported in 17 Rhode Island Reports 241.]

BILL IN EQUITY to remove a cloud on title to realty and for an injunction. On demurrer to the bill.

February 7, 1891. PER CURIAM. This is a bill in equity to enjoin an execution sale. It sets forth that August 17, 1888, the complainant purchased of Martin B. Arnold certain real estate, describing it, and received from Arnold a full warranty deed of the same, in fee simple, and on the same day went into possession thereof, and has ever since been, and now is, seized and possessed thereof in fee simple for his own use; that he paid for said real estate its full actual value, to wit, the sum of four thousand dollars, though the consideration expressed in the deed is only five hundred dollars. It further sets forth that May 14, A.D. 1889, the respondent, Battey, commenced an action against said Arnold and one Horton, as copartners, and caused the writ therein to be served, among other ways, by attaching all the right, title, and interest of said Arnold in said real estate, and afterwards recovered judgment in said action against said Arnold and Horton, and took out execution thereon; causing the same to be levied on all the right, title, and interest which the said Arnold had in said real estate on May 14, 1889, at the time of the attachment thereof, and said right, title, and interest to be advertised for sale thereunder by the respondent, Thayer, as deputy sheriff. The bill asks that this levy may be dissolved and vacated, and that the respondents, Battey and Thayer, may be enjoined from making such sale, and that the cloud created by said levy on said estate may be removed.

The defendants demur to the bill, and in support of the demurrer contend that the bill does not state a case for equitable relief, on the ground that the execution sale, if allowed, will not cloud the complainant's title. They refer to Pomeroy's Equity Jurisprudence, § 1399, which states as follows, to wit : "Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its validity, . . . the court will not exercise its jurisdiction either to restrain or remove a cloud, for the assumed reason that there *is* no cloud." There are numerous cases, however, as the list of cases cited by the complainant shows, in which the rule thus stated has been either utterly ignored, or if recognized, disregarded. The reasons against it are forcibly stated by Pomeroy himself. "While this doctrine may be settled by the weight of authority," he says, "I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily, in the courts, of defendants urging that the instruments under which they claim *are void*, and therefore that they ought to be permitted to stand unmolested ; and of judges deciding that the court cannot interfere because the *deed or other instrument is void*; while from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself, who repeats the rule, would neither buy the property while thus affected, nor loan a dollar upon its security." It is the force of these reasons which has doubtless led many courts to grant relief by removing the alleged cloud in cases which fall within the rule as above stated. In Kenyon *v.* Clarke,¹ decided in 1851, this court enjoined an execution sale, though the levy was defective and invalid upon its face. The ground of decision was thus stated by Brayton, J., who delivered the opinion : "Was the levy of the execution on the plaintiff's real estate void? If it was, the only effect must be to bring the plaintiff's title into doubt and diminish the value of the estate to him; preventing that full dominion and power of disposal which every man is entitled fully to enjoy." The remark is as applicable to the case at bar as it was to the case in which it was made. We know of no Rhode Island case in which the authority of Kenyon *v.* Clarke has been denied or overruled. The case of Greene *v.* Mumford,² which has been referred to, was a case in which the court refused to enjoin a sale of real estate for the collection of certain taxes assessed against the complainant, alleged to have been illegal and void. The injunction was refused, not because the taxes were void upon their face, but because it would be against public policy

¹ 2 R. I. 67.

² 5 R. I. 472.

to embarrass in that way the collection of taxes, and because there was another remedy of which the complainant might avail himself. The case of *Sherman v. Leonard*¹ simply follows *Greene v. Mumford* as authority, the remarks of the court being directed to show that there were no special equities by which the former could be distinguished from the latter case. In this state of the authorities, we see no reason why we should not follow *Kenyon v. Clarke*. It seems to us that, as between the two lines of decision, the broader line rests upon the better reasons. The following are cases in which the cloud removed or prevented was created by execution sale either made or threatened: *Shattuck v. Carson*;² *Hickman v. O'Neal*;³ *Pixley v. Huggins*;⁴ *Christie v. Hale*;⁵ *Key City Gas Light Co. v. Munsell*;⁶ *Norton v. Beaver*;⁷ *Bank of United States v. Schultz*;⁸ *Pettis v. Shepherd*;⁹ *First Nat. Bank of Knightstown v. Deitch*;¹⁰ *Grover v. Webber*;¹¹ *Tibbetts v. Fore*.¹²

Demurrer overruled.

James Tillinghast and Theodore F. Tillinghast for complainant.
George J. West for respondents.

FREEMAN *v.* BROWN.

IN THE SUPREME COURT OF ALABAMA, NOVEMBER TERM, 1891.

[Reported in 96 Alabama Reports 301.]

APPEAL from the Chancery Court of Fayette.

Heard before the Hon. Thomas Cobbs.

The bill in this case was filed on the 18th June, 1890, by John A. Brown, against Benjamin F. Freeman, and sought the cancellation of a mortgage to the defendant, and its removal as a cloud upon the complainant's title to a tract of land purchased by him from one Monroe. The following state of facts was alleged in the bill: In March, 1884, said Monroe, being then the owner of the land in question, mortgaged it to the defendant to secure a debt owing to him. In October, 1887, Monroe proposed to sell the land to the complainant, and the complainant agreed to buy it if defendant would release his mortgage. The defendant came with Monroe to see the complainant, and told complainant that it was all right for Monroe to convey the property, that he had agreed to look to Monroe for other security, and to release all claims

¹ 10 R. I. 469.

² 2 Cal. 588.

³ 10 Cal. 292.

⁴ 15 Cal. 127.

⁵ 46 Ill. 117.

⁶ 19 Iowa 305

⁷ 5 Ohio 178.

⁸ 2 Ohio 471.

⁹ 5 Paige 493.

¹⁰ 83 Ind. 131, 133.

¹¹ 72 Ill. 606.

¹² 70 Cal. 242.

against the property in question. Relying on these representations of the defendant, the complainant agreed to purchase the land from Monroe. The defendant assisted in the preparation of Monroe's deed to the complainant, and as a justice of the peace took the acknowledgment of it. The deed was delivered, and complainant paid Monroe the purchase price, and placed a tenant in possession of the land. In January, 1890, the defendant, claiming under said mortgage, brought a suit against complainant's tenant for the unlawful detainer of said land, recovered judgment, and was placed in possession by the sheriff. The defendant demurred to the bill, on the ground that, on the facts alleged, complainant had an adequate remedy at law. Against the objection of the defendant, the complainant amended the bill by alleging that, since the bill was filed, an appeal had been taken to the Circuit Court from the judgment in favor of the defendant in said unlawful detainer suit, and that said suit was then pending in the Circuit Court; and by adding a special prayer that the defendant be enjoined from further prosecuting said action of unlawful detainer. From a decree for complainant, defendant appeals.

John B. Sanford for appellant.

McGuire & Collier, contra.

MCCLELLAN, J. Under general rules of equity pleading, the amendment of the bill in this cause, the allowance of which is assigned as error, should not have been allowed, both because it was brought forward after the cause was at issue—indeed, while the hearing was in progress—and because the fact thus sought to be injected into the case occurred subsequent to the filing of the bill; but our statute provides that “amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief;¹ and such amendments “may introduce new matter consisting of facts occurring subsequent to the filing of the original bill, pertaining to the matter of the original bill,” though formerly such matters should have been introduced by a supplemental bill.²

The demurrs to the bill were properly overruled. On the case presented by complainant, he had no remedy in a court of law. The legal title was in the respondent through the foreclosure of a mortgage which antedated complainant's deed. The claim now advanced by complainant rests upon matter *in pais* which, he says, estops respondent to assert this legal title against his own superior equity. Of such claims no cognizance is taken by courts of law; equity alone can be invoked to their effectuation.³ Ordinarily, a bill to remove clouds from title will

¹ Code, § 3449; 3 Brick Dig. p. 379, §§ 201 *et seq.*

² Alabama Warehouse Co. v. Jones, 62 Ala. 550.

³ 3 Brick Dig. p. 448, §§ 26-7.

not lie in behalf of one out of possession, for the reason that ordinarily under these circumstances an action for possession may be maintained at law, judgment in which would dissipate the alleged cloud. But where, as in this case, the title which is supposed to be clouded is an equitable one, the legal remedy does not exist, no recovery could be had at law, however meritorious plaintiff's title might be in the contemplation of a court of conscience, and upon this consideration the principle has become well established that chancery may be resorted to for relief against the cloud by one out of possession.¹

The evidence found in this record, in our opinion, sustains the conclusion of the Chancellor that the respondent waived his mortgage on the land in controversy in furtherance of the proposed sale of it by Monroe to complainant, informed complainant of such waiver, willingly allowed him to purchase the property from Monroe and pay for it on the assumption that his, respondent's, lien was released and waived, and that the purchase and payment were induced by this assumption, thus authorized and justified by the statements and conduct of the respondent. It is unnecessary, and would be unprofitable, to discuss the evidence in detail. It will suffice to say that the averments of the bill in this regard are supported by the testimony of three or four disinterested witnesses and of complainant himself, while, to the contrary, only the evidence of respondent and his wife is adduced; and if it be conceded that there are discrepancies between the witnesses for complainant, they are such only as may well have resulted from a mere failure of memory on the part of some of them of circumstances fully recalled by others, and not such as involved any positive contradiction of one or more by others; while, on the other hand, the discrepancies between the testimony of respondent and that of his wife are as numerous, and some of them of a more serious character—as, for instance, in respect of the proposition for Monroe to give Freeman another mortgage on property at Day's Gap, as to which respondent testifies that nothing at all was ever said, and his wife swears that she advised him not to give up his mortgage on the property at Berry Station for one on that at Day's Gap, etc., etc.—as among complainant's witnesses. And, moreover, it is undisputed that respondent assisted in the preparation of Monroe's deed to complainant, knew its contents, and took the acknowledgment of it; and all this, as Mrs. Freeman's evidence goes to show, he did with the knowledge that complainant was buying and paying for the land in the belief that the mortgage had been waived, and without informing complainant to the contrary, as his wife testifies she besought him to do.

That the facts, averred in the bill and which we concur with the Chan-

¹ Echols *v.* Hubbard, 90 Ala. 309.

cellor in holding are established by a satisfying preponderance of the evidence, raise up an estoppel in favor of the complainant against the assertion by respondent of any title under the mortgage, and entitle complainant to the relief prayed, there can, upon principle and authority, be no doubt.¹

The decree of the Chancery Court is affirmed.

SHARON *v.* TUCKER.

IN THE SUPREME COURT OF THE UNITED STATES, APRIL 11, 1892.

[Reported in 144 *United States Reports* 533.]

THE court stated the case as follows:

This was a suit in equity to establish, as matter of record, the title of the complainants to certain real property in the city of Washington, constituting a part of square number one hundred and fifty-one, and to enjoin the defendants from asserting title to the same premises as heirs of the former owner.

The facts which gave rise to it, briefly stated, are as follows: In 1828, Thomas Tudor Tucker died seized of the premises in controversy. He had, at one time, held the office of Treasurer of the United States, and resided in Washington, but at the time of his death he was a resident of South Carolina. The property did not pass under his will, but descended to his heirs at law. It does not appear that after his death any of the heirs took possession of the property or assumed to exercise any control over it. In 1837 the square was sold for delinquent taxes, assessed by the city against "the heirs of Thomas T. Tucker," and was purchased by Joseph Abbott, then a resident of the city. The taxes amounted to \$38.76, and the sum bid by the purchaser was \$250. In 1840 a tax deed, in conformity with the sale, was made to Abbott, purporting to convey to him a complete title to the square. It is admitted that the deed was invalid for want of some of the essential preliminaries in assessing the property and in advertising it for sale. It does not appear, however, that the purchaser had any knowledge of this invalidity. Early in the following year, 1841, he took possession of the square and enclosed it with a board fence and a ditch with a hedge planted on one side of it. It was a substantial enclosure, sufficient to turn stock and keep them away. He was a stable-keeper, and, in connection with this business, cultivated the ground and raised crops upon it in 1841. From the time he took possession until 1854 the

¹ Lindsay *v.* Cooper, 94 Ala. 170, and authorities there cited.

square was enclosed, and each season it was cultivated. In 1854 he leased the square to one Becket for the period of ten years at a yearly rent of one hundred dollars. Becket took possession under his lease and kept the ground substantially enclosed, and he occupied and cultivated it from that time up to 1862. In the fall of that year soldiers of the United States, returning from the campaign in Virginia, were encamped upon the square, and, as it appears, they committed such depredations upon the fence, buildings, and crops that the lessee was obliged to abandon its cultivation. Abbott died in April, 1861, and, by his will, devised the square to his widow. In August, 1863, she sold and conveyed it to one Perry, and he kept a man in charge of the same, who lived in a small building which Becket had built and occupied during his lease of the premises under Abbott. In 1868, Perry sold the entire square to Henry A. Willard for the consideration of seventeen thousand six hundred dollars. He divided the square into small lots for buildings for residences, and upon one side of the square, fronting on T street, erected twelve substantial dwelling-houses, which have been since occupied up to the commencement of this suit. In 1872, Willard sold and conveyed a portion of the square, the premises in controversy, to J. M. Latta, trustee, for a valuable consideration, and from him the title has passed by regular conveyances to the complainants herein. From 1840 to 1863 the square was chiefly valuable for agricultural purposes, but since then, and especially of late years, its only value has been for buildings as residences, and has been so regarded by its owners. From 1840 up to the present time the taxes upon the property have been paid by Abbott and his successors in interest. None of the heirs of Mr. Tucker, nor any one claiming under the heirs, has paid or offered to pay any taxes assessed on the property, nor, since that date, up to the commencement of these suits, have any of the defendants therein or their predecessors in interest asserted any claim to the property or interest in it, or attempted in any way to interfere with its possession or control. Soon after the sale to Perry, in 1863, the tax deed was passed upon by eminent counsel in the District, the late Richard S. Coxe and James M. Carlisle, and the title by it was pronounced by them to be indisputable. It was only a short time before the institution of this suit that the invalidity of the tax deed as a source of title was ascertained. A desire to dispose of the property led the complainants to have an investigation made and an abstract of title obtained. It was then discovered that they could not obtain any abstract of title which purchasers would accept, in consequence of certain defects in the assessment of the taxes under which the sale was made and the deed to Abbott was executed. They were consequently embarrassed and defeated in

their efforts to dispose of the property. To remove this embarrassment this suit was accordingly brought by the complainants to obtain a judicial determination of the validity of their title and an injunction against the defendants claiming under the previous owner.

There was no substantial disagreement between the parties as to the facts, but the defendants insisted and relied solely upon the ground that a court of equity could afford no relief to the complainants, because they were not at the commencement of the suit in actual possession of the premises.

The court below, at special term, sustained this view, and entered a decree dismissing the bill. At general term it affirmed that decree, and to review this last decree the case is brought here by appeal.

Mr. C. J. Hillyer and Mr. J. H. Ralston for appellants.

Mr. Eppa Hunton and Mr. Henry Wise Garnett for appellees.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The title of the complainants is founded upon the adverse possession of themselves and parties, through whom they derive their interests, under claim and color of title, for a period exceeding the statutory time which bars an action for the recovery of land within the District of Columbia. The statute of limitation to such cases in force in the District is that of 21 James I., ch. 16. That statute, passed "for quieting of men's estates and avoiding of suits," among other things declared that no person or persons should at any time thereafter make any entry into any lands, tenements, or hereditaments but within twenty years next after his or their right or title shall thereafter have first descended or accrued to the same, and that in default thereof such persons not entering, and their heirs, should be utterly excluded and debarred from such entry thereafter to be made, any former law or statute to the contrary notwithstanding.

Twenty years is, therefore, the period limited for entry upon any lands within this District after the claimant's title has accrued. After the lapse of that period there is no right of entry upon lands against the party in possession, and all actions to enforce any such alleged right are barred. Complete possession, the character of which is hereafter stated, of real property in the District for that period, with a claim of ownership, operates therefore to give the occupant title to the premises. No one else, with certain exceptions—as infants, married women, lunatics, and persons imprisoned or beyond the seas, who may bring their action within ten years after the expiration of their disability—can call his title in question. He can stand on his adverse possession as fully as if he had always held the undisputed title of record.

The decisions of the courts have determined the character of the possession which will thus bar the right of the former owner to recover real property. It must be an open, visible, continuous, and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claimants. In the present cases the adverse possession of the grantors of the complainants sufficient to bar the right of previous owners, is abundantly established within the most strict definition of that term.

The objection of the defendants to the jurisdiction of a court of equity in this case arises from confounding it with a bill of peace and an ordinary bill *quia timet*, to neither of which class does it belong, nor is it governed by the same principles. Bills of peace are of two kinds: First, those which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common source. A right of fishery asserted by one party and controverted by numerous riparian proprietors on the river, is an instance given by Story where such a bill will lie. In such cases a court of equity will interfere and bring all the claimants before it in one proceeding to avoid a multiplicity of suits. A separate action at law with a single claimant would determine nothing beyond the respective rights of the parties as against each other, and such a contest with each claimant might lead to interminable litigation. To put at rest the controversy and determine the extent of the rights of the claimants of distinct interests in a common subject the bill lies, which is thus essentially one for peace. Second: bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and are brought to put an end to the controversy. "The equity of the plaintiff in such cases arose," as we said in *Holland v. Challen*,¹ "from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases

¹ 110 U. S. 15, 19.

the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed."¹ It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession to real property—are brought, that proof of the complainant's actual possession is necessary to maintain the suit.²

There is no controversy such as here stated in the present case. The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity, and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim. The title by adverse possession, of course, rests on the recollection of witnesses, and, by a judicial determination of its validity against any claim under the former owners, record evidence will be substituted in its place. Embarrassments in the use of the property by the present owners will be thus removed. Actual possession of the property by the complainants is not essential to maintain a suit to obtain in this way record evidence of their title to which they can refer in their efforts to dispose of the property.

The difference between this case and an ordinary bill *quia timet* is equally marked. A bill *quia timet* is generally brought to prevent future litigation as to property by removing existing causes of controversy as to its title. There is no controversy here as to the title of the complainants. The adverse possession of the parties, through whom they claim, was complete, within the most exacting judicial definition of the term. It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he in-

¹ Adams on Equity, 202; Pomeroy's Equity Jurisprudence, § 248; Stark *v.* Starrs, 6 Wall. 402; Curtis *v.* Sutter, 15 Cal. 259; Shepley *v.* Rangeley, 2 Ware 242; Devonsher *v.* Newenham, 2 Schoales & Lef. 199.

² Frost *v.* Spitley, 121 U. S. 552, 556.

trude upon the premises. In several of the States this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title.¹

"As a general doctrine," says Angell in his treatise on limitations, "it has too long been established to be now in the least degree controverted that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Independently of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest; and upon this acquiescence is founded the presumption of the existence of some substantial reason (though perhaps not known), for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be of very strong, if not of conclusive force."

As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate, or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment.² The form of the remedy will vary according to the particular circumstances of each case. "It is absolutely impossible," says Pomeroy, in his treatise, "to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations."

In Blight *v.* Banks,³ a bill was filed by the complainant to supply the want of certain records or conveyances, under which he claimed title, said to have been executed and lost. A patent had been issued by the Commonwealth of Virginia for a large amount of property, which, by various intermediate conveyances, had become vested in the complain-

¹ Leffingwell *v.* Warren, 2 Black 599; Campoell *v.* Holt, 115 U. S. 620, 623.

² Pomeroy's Equity Jurisprudence, vol. I, sec. 171.

³ 6 T. B. Monroe 192, 194.

ant. These conveyances had not been recorded, and on that ground the complainant alleged that his title was in jeopardy from creditors and innocent purchasers ; that with great difficulty any title could be established at law, because the conveyances could not be given in evidence without parol proof ; and that some of the witnesses were dead, and some of the original conveyances were lost and could not be found. His prayer was that his title might be rendered complete as a recorded title by the decree of the chancellor. The first question made in the case by the defendant was as to the jurisdiction of the court. It was contended that such omissions in completing a defective title were generally the fault of the grantees, and that equity would not sustain a bill for that purpose. But the Court of Appeals of Kentucky replied that it could not doubt the propriety of the interference of the chancellor in such case. "Equity," said the court, "will frequently interfere to remove difficulties in land titles, where a party cannot proceed without difficulty at law ; when the conveyances are lost, or in the possession of the opposite party ; or where the parties are numerous, and the proof hard of access ; and in many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope. And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction, and a class of bills termed in the books ejectment bills, in which not only the title is made clear, but the possession decreed also. No reason is perceived by us why the present case is not within the spirit of these cases. The difficulties in an unrecorded title, especially if it is derived through a long chain of conveyances, are familiar to our courts in this country. The danger to which the title is exposed from two classes of persons, creditors and subsequent purchasers, is often great and the facilities afforded from a title which can be read in evidence without other proof than the authentication annexed, are felt by every one who has to bring his title into court for attack or defense, and the present case will furnish a good comment on the propriety of the interference of the chancellor." The court, therefore, decreed the relief prayed. On a petition for a rehearing it reviewed its former opinion, the main point of which was the jurisdiction of the court of equity over the bill, and said :

"It is true that bills to make legal titles which are valid against all the world, except two descriptions of persons, recorded titles, and thus to protect them from creditors and innocent purchasers, have not been frequent. But if such bills cannot be allowed under one state of conveyances, it must certainly be said that there is a defect of justice in our country. A court of common law can give no relief in such a case, and if equity cannot do it then is the case a hopeless one. If, however, the principles which govern courts of equity are examined it will be found

that there are many circumstances in this case, independent of defective conveyances, which sustain the jurisdiction" (pp. 220, 221).¹

In *Hord v. Baugh*,² a bill was filed by the complainant asking the aid of a court of chancery to set up a deed of bargain and sale, which was lost or destroyed before registration, the bargainer having died without executing another. The chancellor below dismissed the bill upon the ground that the bargainer having once conveyed the land, had parted with all his interest therein, and that the court had no jurisdiction of such a case. But the Supreme Court of Tennessee thought the chancellor erred, saying: "The loss of the deed is a casualty seriously endangering the complainant's title, as he can maintain no action of ejectment without it. He then certainly must have a right to ask the aid of a court of chancery in his case, either by having the legal title vested in him as against the bargainer and his representatives, or by having the deed set up and established as in all other cases of lost deeds. The complainant may have his decree for either or both of these remedies."

In *Montgomery v. Kerr*,³ the same court sustained a bill and established the complainant's title where a deed of the property had been lost. The decree was that the complainant was entitled, by virtue of and under his deed, to hold the premises in fee simple, and that the defendant had no right, title, or interest therein.

In *Bohart v. Chamberlain*,⁴ the proof showed that a deed of trust which had been executed by defendant to the plaintiff had been subsequently lost without being recorded. The court on being satisfied of the correctness of the finding of the lower court to this effect, said: "No doubt is entertained that a court of equity would have jurisdiction to afford the relief prayed for in the petition. One of the most common interpositions of equity is in the case of lost deeds and instruments. A court of equity in case of the loss of an instrument which affects the title or affords a security will direct a reconveyance to be made."⁵ And the court added that "under the authorities cited the lower court might have directed a re-execution of the deed of trust; but, as its powers were flexible, it could accomplish the same object by a declaratory decree, establishing the existence of the deed in question."⁶

Many other authorities to the same purport might be cited. They

¹ See also *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 449.

² 7 *Humph.* 576, 578.

³ 6 *Coldwell* 199.

⁴ 99 *Missouri* 622, 631.

⁵ Citing *Stokoe v. Robson*, 19 *Ves.* 385; 1 Story's *Equity Jur.* secs. 81, 84; *Lawrence v. Lawrence*, 42 *N. H.* 109; 1 *Mad. Ch.* 24; *Fonblanche's Equity*, ch. 1, sec. 3.

⁶ 2 *Pomeroy's Eq.*, sec. 827; *Garrett v. Lynch*, 45 *Alabama* 204; 1 *Pomeroy's Eq.*, secs. 171, 429.

are only illustrative of the remedies afforded by courts of equity to remove difficulties in the way of owners of property using and enjoying it fully, when, from causes beyond their control, such use and enjoyment are obstructed. The form of relief will always be adapted to the obstacles to be removed. The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassments to the complainants in the use and enjoyment of their property are obvious and insuperable except by relief through that court. No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record. It is, therefore,

Ordered that the decree of the court below be reversed, and the cause remanded to that court with directions to enter a decree declaring the title of the complainants to the premises described in their complaint, by adverse possession of the parties through whom they claim, to be complete, and that the defendants be enjoined from asserting title to the said premises through their former owner. Each party to pay his own costs.

LEWIS C. KING, RESPONDENT, *v.* JOHN TOWNSHEND,
IMPLEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 27, 1894.

[*Reported in 141 New York Reports 358.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of June, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Townshend for appellant.

L. A. Gould for respondent.

FINCH, J. The relief sought in this action is the cancellation of a lease executed and delivered by the comptroller of the city of New York upon a sale for unpaid taxes. It is admitted by the defendant, who is the assignee of the lease, that it is void because the sale included an illegal charge for interest. It would seem that such an admission should at once end the controversy and the lease be promptly cancelled, but

some ulterior purpose appears to lie behind the apparent litigation, and serves to prolong it. For, notwithstanding the defendant's concession, he resists the relief sought upon the double ground that there is no cloud on the one hand and no title to be clouded on the other.

The claim that the lease constitutes no cloud is founded upon the provisions of the statute which make the lease inchoate; ineffective to produce a right of possession or establish a title; until a specified notice to redeem has been given to occupant or owner, and a certificate of which, signed by the comptroller, must accompany the record of the lease.¹ It is undoubtedly true that, until that certificate is given, the right of the lessee is imperfect and no title passes by the conveyance.² But if we concede that the imperfect and inoperative lease does not constitute an actual cloud it is nevertheless a decisive step towards the creation of a cloud and a threat and menace to create one in the future. Equity may interfere to prevent a threatened cloud as well as to remove an existing one.³ It is true that, in such a case, there must appear to be a determination to create a cloud, and the danger must be more than merely speculative or potential. That was said of tax proceedings in which no lease had been given and there was no proof that the purchaser claimed it or the city threatened it. Here it has been given. Its very existence is a threat. It was not given for amusement or as an idle ceremony. It meant and could only mean a purpose to subvert the title and possession of the owner. The further steps necessary to make the result effective lay wholly in the option of the lessee. If he actually served the necessary notice and filed the prescribed affidavit and satisfied the comptroller of those facts, the certificate followed as a matter of course if not barred by a redemption. The lessee, therefore, in the present case stands with an effective weapon in his hands and may strike his blow when he pleases. It is in that respect that the situation differs from that in *Clark v. Davenport*.⁴ There the State comptroller had not given a deed and was not bound to give it. He might instead cancel the sale, and could be compelled to do so. Here the city comptroller has given the lease and has no discretion left. If the grantee gives the notice and proves it, the comptroller must make the certificate. Nor is it an answer to say that for many years the lessee has omitted to give the notice. That only intensifies the injury and the danger. In *Hodges v. Griggs*⁵ a creditor's execution against land following an attachment had been allowed to sleep for seven or eight years,

¹ Laws of 1871, ch. 381, §§ 13, 14, 15, and 16.

² *Lockwood v. Gehlert*, 127 N. Y. 241.

³ *Sanders v. Yonkers*, 63 N. Y. 492.

⁴ 95 N. Y. 478.

⁵ 21 Verm. 280.

and equity required him to enforce his right or remove the threatened cloud. And so the defendant here has no right to maintain a threat of title as lessee, when he confesses that it is founded on no legal right. The lease is something more than a certificate of sale. It is in form and terms a conveyance, effective at the option of the lessee if there be no redemption. The statute provides that "all such leases executed by the said comptroller and witnessed by the clerk of arrears, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements for taxes or assessments, or Croton water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute." Such a lease, armed with such presumptions, effective at the option of the lessee, unless there is a redemption for his benefit drawing forty-two per cent. of interest, and sufficient to prevent any sale of the property and cloud the owner's right, cannot be said to be a mere speculative danger.

Nor is it true that the invalidity of the lease appears upon its face. It shows no details of the amounts for which the sale was made, and the presumptions attending it make proof of such details unessential to the right of the lessee. It is only by evidence outside of the lease itself that its invalidity can be made to appear.

I think, therefore, that enough was shown to justify the intervention of equity to cancel the lease even if considered only as a threat to create a cloud, and if the action be regarded as one not to remove but to prevent a cloud.

It follows that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

CHAPTER V.

WASTE.

BISHOP OF WINCHESTER *v.* KNIGHT.

IN CHANCERY, BEFORE LORD COWPER, C., HILARY TERM, 1717.

[*Reported in 1 Peere Williams 406.*]

ONE held customary lands of the Bishop of Winchester, as of his manor of Taunton-Dean in Somersetshire, in which lands there was a copper mine that was opened by the tenant, who dug thereout and sold great quantities of copper ore, and died, and his heir continued digging and disposing of great quantities of copper ore out of the said mine.

The Bishop of Winchester brought a bill in equity against the executor and heir, praying an account of the said ore, and alleging that these customary tenants were as copyhold tenants, and that the freehold was in the Bishop, as lord of the manor and owner of the soil, and that the manner of passing the premises was by surrender into the hands of the lord to the use of the surrenderee.

On the other side, it was said, that it did not appear the admittance, in this case, was to hold *ad voluntatem domini, secundum consuetudinem*, etc., without which words [*ad voluntatem domini*], it was insisted, there could be no copyhold, as had been adjudged in Lord C. J. Holt's time.

Then, as to the ore dug in the ancestor's lifetime, there was no color to ask relief; because this being a personal tort, the same died with the person, and that with respect to the ore dug in the heir's own time, there could be no remedy; for that these customary tenants were as freeholders, and there was full proof that they, from time to time, had used to cut down and fell timber from off the premises, and had also dug stone and sold it.

LORD CHANCELLOR. It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy.

It is true, as to the trespass of breaking up meadow, or ancient pasture-ground, it dies with the person; but as to the property of the ore or timber, it would be clear even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it; but it is stronger in this case, by reason that the tenant is a sort of a fiduciary to the lord, and it is a breach of the trust which the law reposes in the tenant for him to take away the property of the lord; so that I am clear of opinion, the executor, in such case, is answerable.

As to the evidence that the tenant might do one sort of waste, as to cut down and dispose of the timber, this might be by special grant; but it is no evidence that the tenant has a power to commit any other sort of waste, viz.: waste of a different species, as that of disposing of minerals; but a custom empowering the tenants to dispose of one sort of mineral, as coals, may be an evidence of their right to dispose of another sort of mineral, as lead out of a mine.

But this question being doubtful, and at law, let the Bishop bring his action of trover as to the ore dug and disposed of by the present tenant.

Accordingly this was tried, and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might, by custom, dig and open new copper mines; so that upon the producing of the *postea*, the court held, that neither the tenant without the license of the lord, nor the lord without the consent of the tenant, could dig in these copper mines, being new mines.

JESUS COLLEGE *v.* BLOOM.

IN CHANCERY, BEFORE LORD HARDWICKE, C., NOVEMBER 4, 1745.

[Reported in Ambler 54.]

THIS bill was brought by the Master and Fellows of Jesus College, in Oxford, for an account of timber cut down on the premises by them let to the defendant, and for an account of some stones which he had carried off the land.

LORD CHANCELLOR. This is the most extraordinary bill that ever was brought in this court, and I hope never to see one of the like nature again.

On this bill there arise two questions: 1st, Whether bills are to be maintained in this court merely for timber cut down after the term is

gone out of the tenant by assignment? or, Whether such bills can only be brought for an account of such waste done, without at the same time praying an injunction? And I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action; in a court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this court, for satisfaction of damages is not the proper ground for the court to admit of these sort of bills, but the staying of waste; because the court presumes, when a man has done waste, he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time an account of the waste done; for though a court of law may give damages, yet it cannot prevent further waste: and it is upon this ground, to prevent multiplicity of suits, that this court will decree an account of waste done at the same time, with an injunction; just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet, to prevent multiplicity of suits, the court will direct an account to be taken.

If the court were to allow of these sort of bills, it would create infinite vexation: there is not one precedent to warrant it. The cases cited do not come up to the present.¹ It does not appear in that case, that an injunction to stay waste generally was not prayed; if it was, that brings it within the common case. As to the case of the Bishop of Winchester *v.* Knight,² I am at a loss to know upon what grounds the court went. The book says, because it was a demand against an executor; but I doubt greatly as to this, for it is far from being a general rule of this court to entertain a bill against an executor for a tort committed by his testator. The more probable reason for decreeing an account in that case seems to be, because it was the case of mines; and the court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this court will relieve and decree an account of ore taken, when in any other tort or wrong done it has refused relief. If this be the reason of the determination in that case, as I really think it is, it stands quite different from the present; I am therefore of opinion, upon this first head, that this bill brought by Jesus College, to have satisfaction for timber cut down after an assignment of the lease, when the proper remedy is at law, ought to be dismissed.³

¹ Whitfield *v.* Bewick, 3 Wms. 267.

² 1 Wms. 406.

³ A portion of the opinion, dealing with a question of costs, has been omitted.
—ED.

MARQUIS OF LANSDOWNE AND OTHERS *v.* MARCHIONESS DOWAGER OF LANSDOWNE.IN CHANCERY, BEFORE SIR THOMAS PLUMER, V. C., NOVEMBER 7,
17, 1815.*[Reported in 1 Maddock 116.]*

By indentures of lease and release and appointment, dated respectively the 16th and 17th days of May, 1794, the release and appointment being made between William, then Marquis of Lansdowne, of the first part; the Right Honorable John Henry Petty, since Marquis of Lansdowne, then commonly called Earl of Wycombe, the eldest son and heir-apparent of said William Marquis of Lansdowne, of the second part; John Cross, gentleman, of the third part; John Eardley Wilmot, Esquire, and Sir Francis Baring, Bart., of the fourth part; and the Right Honorable Henry Richard Lord Holland, and Benjamin Vaughan, Esquire, of the fifth part; it was witnessed, that in pursuance of the several agreements therein recited, and for other the considerations therein mentioned, he, said William then Marquis of Lansdowne, with the consent of said John Henry late Marquis of Lansdowne, did grant, etc., unto the said John Wilmot and Sir Francis Baring, their heirs and assigns, divers manors, etc., therein particularly described; and all that capital messuage or mansion-house, called Lansdowne House, and other lands therein particularly described; and also all that the manor, park, or late park, called or known by the name of Bowood Park, and the ground and soil thereof, and the capital messuage or mansion-house thereon erected and built, and the buildings thereto belonging; and also divers other manors, messuages, farms, lands, tenements, and hereditaments, situate, etc., in the county of Wilts, therein particularly mentioned and described, with the rights privileges, etc., to have and to hold said manors, messuages, farms, lands, tenements, and hereditaments, etc., unto said John Wilmot and Sir Francis Baring, their heirs and assigns, subject as to certain parts of the said hereditaments respectively comprised in certain mortgages therein mentioned, to the mortgages affecting the same, to the uses, upon the trusts, and to and for the intents and purposes therein and after mentioned, (that is to say) to the use of said Henry Richard Lord Holland, and Benjamin Vaughan, their executors, administrators, and assigns, for and during and unto the full end and term of five hundred years, to commence and be computed from the day next before the day of the date of said indenture of release of the 17th of May, 1794, and thence next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste, upon

the trusts, and for the intents and purposes thereafter mentioned, declared, or expressed concerning the same, and from and after the end, expiration, or sooner determination of said term of five hundred years; and in the meantime subject thereto and to the trusts thereof, to the use of said William Marquis of Lansdowne, and his assigns, for and during the term of his natural life, but subject to impeachment for waste, except as therein mentioned; with remainder to the use of the said John Wilmot and Sir Francis Baring, and their heirs, for and during the life of said William Marquis of Lansdowne, upon trust, to preserve the contingent remainders, but to permit and suffer said William Marquis of Lansdowne, and his assigns, to have, receive, and take the rents, issues, and profits, to his and their own use during his life; and from and after his decease, to the use of said John Henry late Marquis of Lansdowne, and his assigns, for and during the term of his natural life, without impeachment of waste, with remainder to the use of said John Wilmot and Sir Francis Baring, and their heirs, for and during the natural life of said John Henry late Marquis of Lansdowne, upon trust, to preserve the contingent remainders from being defeated or destroyed, but to permit and suffer said John Henry late Marquis of Lansdowne, and his assigns, to receive and take the rents, issues, and profits to his and their own use, during the term of his life; and from and immediately after the decease of said John Henry late Marquis of Lansdowne, to the use of said Henry Richard Lord Holland, and Benjamin Vaughan, their executors, administrators, and assigns, for and during the full end and term of eight hundred years, to commence and be computed from the decease of the survivor of them said William Marquis of Lansdowne, and John Henry late Marquis of Lansdowne, without impeachment of waste, upon the trusts thereafter mentioned, and subject thereto, to the use of the first and other sons of the body of said John Henry late Marquis of Lansdowne, severally and successively in tail male, and for default of such issue to the use of plaintiff, Henry Marquis of Lansdowne, and his assigns, for his life, without impeachment of waste; with remainder to the use of said John Wilmot and Sir Francis Baring, and their heirs, during the life of plaintiff, Henry now Marquis of Lansdowne, upon trust, to preserve contingent remainders, but upon trust to permit and suffer plaintiff, Henry, now Marquis of Lansdowne, and his assigns, to receive and take the rents, issues, and profits for his life, for his and their own use and benefit; and from and immediately after the decease of Henry Marquis of Lansdowne, to the use of the first and other sons of the body of said Henry Marquis of Lansdowne, severally and successively in tail male, with divers remainders over; and the trusts of

said terms of five hundred years, and eight hundred years, were declared to be to raise certain sums of money; and there was contained in said indenture of release and appointment, a proviso, empowering the tenant for life in possession of said premises, by virtue of the above-mentioned limitations, in case of the death of said John Wilmot and Sir Francis Baring, or either of them, on resignation of said trusts by them, or either of them, to appoint other trustees, or another trustee in lieu of them, or of either of them.

William Marquis of Lansdowne died the 7th of May, 1805, and thereupon said John Henry Marquis of Lansdowne came into possession, or into the receipts of the rents and profits of the aforesaid hereditaments, by virtue of the limitations aforesaid; and he continued in such possession or receipt during his life; and said John Henry Marquis of Lansdowne, at different times since the death of his said late father, that is to say, during the winter of the years 1805, 1806, 1807, and 1808, cut down, or caused to be cut down, large quantities of timber trees, and other ornamental trees, standing and growing near said capital mansion-house at Bowood; and he also cut down divers young trees and saplings, which had been planted before the death of said William late Marquis of Lansdowne, and were growing for timber upon the lands of which said John Henry Marquis of Lansdowne was tenant for life, as aforesaid; and he sold and disposed of a large part thereof for large sums of money; and same were received by him, or by his orders, or for his use; and particularly he cut down, or caused to be cut down, after the death of said William Marquis of Lansdowne, a large avenue of elm and ash trees, leading towards and up to said mansion-house at Bowood, on the northeast front thereof, and all the trees on the pleasure ground and lawn thereto belonging; and he also, since the death of said William late Marquis of Lansdowne, cut down, and caused to be cut down, divers oak, ash, and other tellers and saplings, standing and growing upon other parts of said premises, of which he was tenant for life as aforesaid; and same were standing and growing for timber; and same were in a thriving and improving condition; and they would have been good timber trees if they had been permitted to stand and grow; but same were so small as not to be measured as timber according to the usage of timber-merchants, and same were not fit to be cut down.

In consequence of such waste, said John Eardley Wilmot, and Sir Francis Baring, in February, 1809, filed their bill against said John Henry Marquis of Lansdowne, and the plaintiff, Henry Marquis of Lansdowne, by his then name of Lord Henry Petty, stating the foregoing facts, and praying that an account might be taken by and under the direction of the court, of the ornamental trees, young trees, and sap-

lings, so improperly cut down by said John Henry Marquis of Lansdowne, and of the value thereof; and that said John Henry Marquis of Lansdowne might be decreed to account and answer for the value thereof, or for the moneys which had been received by him, or by his orders, or for his use, on account thereof; and to pay to the plaintiffs in such bill, or to the accountant-general of the court, what should be found due from him on taking such account, for the benefit of the person who might become entitled thereto; and that the said John Henry Marquis of Lansdowne, his agents, servants, and workmen, might be restrained from cutting any timber or other trees growing upon the said premises, which were growing there for the shelter of the mansion-houses, or for their ornament, or which were growing in lines, walks, or vistas for the ornament of the lawns and pleasure grounds, and from cutting down saplings and trees not fit for the purposes of timber, and from cutting down timber trees at unseasonable times, and in an unhusbandlike manner; and for general relief.

Upon the bill being filed, together with affidavits in support of the same, an injunction was granted by the court, according to the prayer of said bill. John Henry Marquis of Lansdowne afterwards put in his answer to the bill, and counter affidavits were filed by John Henry Marquis of Lansdowne; and an application was made to dissolve the injunction; but before any order was thereupon made, or any further proceedings were had in the suit, and on or about the 14th of November, 1809, said John Henry Marquis of Lansdowne died, and thereby the suit abated.

The present supplemental bill was filed after his death, stating the former proceedings, and that John Henry Marquis of Lansdowne died without issue; and upon his death the plaintiff, Henry Marquis of Lansdowne, became entitled as tenant for life in possession to all said manors, etc., subject to the mortgages affecting same; and that John Henry Marquis of Lansdowne duly made and published his last will and testament in writing, bearing date the 12th of April, 1808, and thereby appointed certain persons his executors, who renounced probate thereof; and that administration of his personal estate and effects, with his will annexed, was granted to the defendant by the Prerogative Court of the Archbishop of Canterbury; and also, that after the issuing and service of said injunction, said John Henry Marquis of Lansdowne cut down, or caused to be cut down, divers other trees, which were standing and growing on the pleasure grounds adjoining or belonging to said mansion-house at Bowood, and same had been planted, and carefully preserved for ornament before the death of said William late Marquis of Lansdowne; and same were within view of said mansion-house, or were in the imme-

diate vicinity thereof; and the same were in a growing and thriving state, and unfit to be cut down; and that said John Henry Marquis of Lansdowne caused part of said last-mentioned trees to be sold, and the money produced by the sale thereof was received by the said John Henry Marquis of Lansdowne, or by his orders, or for his use, or the same had, since his death, been received by said Marchioness Dowager of Lansdowne, or by her orders, or for her use; and that the remainder of such last-mentioned trees, and also divers of the trees and saplings so cut down as aforesaid, before the issuing of said injunction, were then lying upon the ground at Bowood; and insisted that the moneys received by said John Henry Marquis of Lansdowne, or by his order, or for his use, from the sale of said trees, ought to be repaid out of his assets. The bill also stated, that John Henry Marquis of Lansdowne did not during his life repair or keep in repair said mansion-house called Lansdowne House, or said mansion-house at Bowood, or the buildings belonging to said mansion-houses, but he suffered the same to become very much out of repair, and at the time of the death of the said William late Marquis of Lansdowne the same were in a state of complete repair, but at the time of the death of said John Henry Marquis of Lansdowne were greatly dilapidated and out of repair; and that the plaintiff, Henry Marquis of Lansdowne, was obliged to lay out large sums of money in the necessary repairs of said mansion-houses and buildings, and the plaintiff, Henry Marquis of Lansdowne, insisted that the moneys which he had so laid out ought to be repaid him out of the assets of said John Henry Marquis of Lansdowne. The bill further stated that, at the death of said John Henry Marquis of Lansdowne the greatest part of the hereditaments so limited as aforesaid by said indentures of lease and release, were held by tenants under subsisting leases that had been previously granted by virtue of leasing powers contained in said indenture of release, or in former family settlements, or otherwise; and that plaintiff, Henry Marquis of Lansdowne, hath since the death of said John Henry Marquis of Lansdowne received the rents and profits of said premises, from the half-yearly rent-day next preceding the death of said John Henry Marquis of Lansdowne; and the plaintiff, Henry Marquis of Lansdowne, insisted that he was so entitled to receive the same to his own use; but plaintiffs stated, that divers parts of said hereditaments were at the death of said John Henry Marquis of Lansdowne subject to divers mortgages; and that said John Henry Marquis of Lansdowne was bound to keep down the interest upon said mortgages, but he suffered the interest thereon to run greatly in arrear during his life; and at the time of the death of said John Henry Marquis of Lansdowne the sum of £2,000 and upwards was

due for interest upon said mortgages, which had become in arrear thereon since the death of said William Marquis of Lansdowne; and that the plaintiff, Henry Marquis of Lansdowne, had, since the death of said John Henry Marquis of Lansdowne, paid said sum of £2,000 and upwards, in satisfaction of said arrears of interest; and the plaintiff, Henry Marquis of Lansdowne, insisted that what he had so paid ought to be repaid to him out of the assets of said John Henry Marquis of Lansdowne. The bill further stated, that the plaintiff, Henry Marquis of Lansdowne, had lately married, and that he hath issue, plaintiff William Thomas Petty, commonly called Earl of Wycombe, his eldest son; and plaintiff, William Thomas Petty, commonly called Earl of Wycombe, is entitled to the first estate of inheritance in said premises, subject to the said mortgages. The bill further stated, that said Sir Francis Baring died on or about the 11th September, 1810; and that by indentures of lease and release, bearing date respectively the 19th and 20th of November, 1810, the release being made between plaintiff, Henry Marquis of Lanedowne, of 1st part; said John Eardley Wilmot of 2d part; plaintiff, Sir Thomas Baring, of the 3d part; and Henry Smith, of Drapers Hall, in the City of London, Esq., of the 4th part, plaintiff, Sir Thomas Baring, under and by virtue of the power contained in the said indenture of release and appointment, of the 17th of May, 1794, was appointed a trustee for the purposes of said indenture of release and appointment, in the room of said Sir Francis Baring; and that said John Eardley Wilmot was afterwards desirous to be discharged from the trusts reposed in him by said indenture of release and appointment; and that by indentures of lease and release, bearing date respectively the 2d and 3d days of March, 1814, the release being made between Henry Marquis of Lansdowne of 1st part; said John Eardley Wilmot, and plaintiff, Sir Thomas Baring, of 2d part; and plaintiffs, James Abercromby and Sir Thomas Baring, of the 3d part; and said Henry Smith of 4th part, the plaintiff, James Abercromby, under and by virtue of said power contained in said indenture of release and appointment of the 17th May, 1794, was appointed a trustee for the purposes of said indenture of release and appointment, in the room of said John Eardley Wilmot. The bill then stated that defendant, Maria Arabella Dowager Marchioness of Lansdowne, hath, by virtue of said administration, possessed and received the personal estate and effects of said John Henry Marquis of Lansdowne, to a great amount, and more than sufficient to answer and satisfy all his just debts, and funeral and testamentary expenses, including what is due from his estate in respect of the several matters aforesaid. And prayed, that defendant might answer the premises; and that said suit and proceedings so abated as aforesaid might be

revived, etc.; and that the account prayed by said original bill may be taken; and that an account may be taken, by and under the direction of the court, of all the ornamental trees so improperly cut down as aforesaid by said John Henry Marquis of Lansdowne, or by his orders, between the issuing of said injunction and the death of the said John Henry Marquis of Lansdowne; and that the value of such part thereof as was sold by John Henry Marquis of Lansdowne may be ascertained, or that an account may be taken of the moneys which were received by him, or by his orders, or for his use, in respect thereof. And that an account may in like manner be taken of the dilapidations permitted by said John Henry Marquis of Lansdowne in and about said mansion-house and buildings at the time of his death, and of the sums of money that were necessarily paid and expended by plaintiff, Henry Marquis of Lansdowne, in repairing said mansion-houses in consequence of said dilapidations; and that an account might in like manner be taken of the arrears of interest due upon said mortgages up to the day of the death of the said Henry Marquis of Lansdowne, and of all the sums of money paid by plaintiff, Henry Marquis of Lansdowne, in discharge of said arrears; and that said defendants may be decreed to pay what should be found due upon taking the aforesaid accounts; and that in case said defendants shall not admit assets of said John Henry Marquis of Lansdowne sufficient to answer what shall be found due from his estate in respect of the matters aforesaid, then that an account may be taken of all the personal estate and effects of said John Henry Marquis of Lansdowne received by her, or by her order, or for her use, or which without her wilful default might have been so received; and that the same may be applied in a due course of administration; and that thereout the several sums which shall be found due upon taking the account aforesaid, may be paid; and that what should be found due in respect of said repairs, and interest of mortgages, might be paid to plaintiff, Henry Marquis of Lansdowne; and that what shall be found due in respect of said timber and other trees, might be paid into court, and be laid out for the benefit of the plaintiffs, Henry Marquis of Lansdowne, and William Thomas Petty (commonly called Earl of Wycombe), according to their interests therein; and that an account might also be taken of all sums of money received by said defendant, or by her order, or for her use, in respect of the sale of any of said timber or other trees; and that she may be decreed personally to pay into court what shall be found due from her, upon taking that account, and that same may in like manner be laid out for the benefit of the plaintiffs, Henry Marquis of Lansdowne and William Thomas Petty (commonly called Earl of Wycombe); and that proper directions may be

given for the sale of said timber and other trees so cut down as aforesaid, and then lying on the ground; and for the disposal of the moneys to arise from the sale thereof.

To this bill the defendant put in the following demurrer:

"Defendant by protestation, etc., to so much and such part of said bill as seeks any discovery from or against this defendant, whether John Henry late Marquis of Lansdowne did not at different times since the death of his father, (that is to say) during the winters of the years 1805, 1806, 1807, 1808, or any, and which of them, or when in particular, cut down, or cause to be cut down, large, and what, quantities of timber trees and other, and what, ornamental trees standing and growing near the capital mansion-house at Bowood in said bill mentioned; and whether he did not also cut down divers, and what, young trees and saplings which had been planted before the death of William late Marquis of Lansdowne, and were growing for timber upon lands in said bill mentioned, or how otherwise; and whether he did not sell and dispose of large, and what, part thereof for large, and what, sums of money; and whether same were not received by him, or by his orders, or for his use; and whether particularly he did not cut down, or cause to be cut down, after the death of said William Marquis of Lansdowne, a large avenue of elm and ash trees leading towards and up to said mansion-house at Bowood, on the northeast front thereof, and all or any, and which, of the trees on the pleasure ground and lawn thereto belonging, or otherwise; and whether he did not also, since the death of said William late Marquis of Lansdowne, and when, cut down, or whether he did not cause to be cut down, divers, and what, oak, ash, and other, and what, tellers and saplings standing and growing upon some and what parts of said premises; and whether the same, or some, and which of them, were not standing, and growing for timber; and whether same were not in a thriving and improving condition; and whether they would not have been good timber trees if they had been permitted to stand and grow; and whether same, or some and which of them, were not so small as not to be measured as timber, according to the usage of timber-merchants, or how otherwise; and whether, after the issuing and service of the injunction in said bill mentioned, and whether said John Henry Marquis of Lansdowne did not cut down, or cause to be cut down, divers other and what trees, which were standing and growing on the pleasure grounds adjoining to said mansion-house at Bowood; and whether same had not been planted and carefully preserved for ornament before the death of said William late Marquis of Lansdowne; and whether same were not within view of said mansion-house, or whether they were not in the immediate

vicinity thereof, or how otherwise; and whether same were not in a growing and thriving state; and whether said John Henry Marquis of Lansdowne did not cause some, and what part, of said last-mentioned trees to be sold; and whether the money produced by the sale thereof was not received by said John Henry Marquis of Lansdowne, or by his orders, or for his use; or whether same hath not, since his death, been received by defendant, or by her orders, or for her use; and whether said John Henry Marquis of Lansdowne ever, and when during his life, repaired, or kept in repair, the mansion-house in said bill called Lansdowne House, or said mansion-house at Bowood, or either, or which of them, or any and which of the buildings belonging to said mansion-houses, or either and which of them; and whether he did not suffer same to become very much out of repair; and also, as to so much of said bill as prays that an account may be taken, by and under the direction of the court, of all the ornamental trees in said bill alleged to have been improperly cut down by said John Henry Marquis of Lansdowne, or by his orders, between the issuing of said injunction and the death of said John Henry Marquis of Lansdowne; and that the value of such part thereof as was sold by said John Henry Marquis of Lansdowne may be ascertained; or that an account may be taken of the moneys which were received by him, or by his orders, or for his use, in respect thereof; and that an account may in like manner be taken of the dilapidations in bill alleged to have been committed by said John Henry Marquis of Lansdowne, in and about said mansion-houses and buildings at the time of his death; and that this defendant may be decreed to pay what shall be found due upon taking the aforesaid accounts; and that, in case this defendant shall not admit assets of said John Henry Marquis of Lansdowne sufficient to answer what shall be found due from his estate in respect of the matters aforesaid, then that an account may be taken of all the personal estate and effects of said John Henry Marquis of Lansdowne received by this defendant, or by her order, or for her use, or which, without her wilful default, might have been so received; and that same may be applied in a due course of administration; and that throughout the several sums which shall be found due upon taking the accounts aforesaid, may be paid; and that what shall be found due in respect of the repairs may be paid to said plaintiff, Henry Marquis of Lansdowne; and what shall be found due in respect of said timber and other trees may be paid into this honorable court, and be laid out for the benefit of said plaintiff, Henry Marquis of Lansdowne, and William Thomas Petty, commonly called Earl of Wycombe, according to their interest therein; and that an account may also be taken of all sums of money received by this defendant, or by her order, or for her use, in respect

of the sale of any of said timber or other trees; and that she may be decreed personally to pay into this court what shall be found due from her upon taking that account; and that same may in like manner be laid out for the benefit of said plaintiffs, Henry Marquis of Lansdowne and William Thomas Petty, commonly called Earl of Wycombe—doth demur, and for cause of demurrer sheweth, that said plaintiffs have not by their said bill made such a case as entitles them, in a court of equity, to any discovery or relief from or against this defendant touching said matters, or any of them: wherefore, and for divers good causes of demurrer appearing in said bill, defendant doth demur to such part of said bill as aforesaid; and defendant prays the judgment of this court, whether she shall be compelled to make any other answer to such part of said bill as is so demurred unto."

An answer to other parts of the bill accompanied the demurrer.

Mr. Leach and *Mr. Heald* for the demurrer. The principal question raised by the demurrer to this supplemental bill is, Whether the representatives of the late Marquis of Lansdowne are bound to make good, out of his assets, the claims made by the plaintiffs in respect of equitable waste committed by the Marquis in his lifetime, subsequent to the issuing of an injunction to restrain him from committing such waste?

It is a rule at law and in equity, that a personal wrong dies with the party. In *Jesus Coll. v. Bloom*,¹ Lord Hardwicke was of opinion he ought not to entertain a bill for a satisfaction for waste after the estate of the tenant that cut down timber was determined by assignment, *or otherwise*; and he expressly states, that an account in respect of waste is only given when a bill is filed for an injunction, and waste has already been committed. The relief given in *Pulteney v. Warren*,² was grounded on the particular circumstances of that case; and the Lord Chancellor³ there recognizes the doctrine of Lord Hardwicke, that a bill does not lie for an account of waste, where there is not a ground for an injunction to restrain waste.⁴

The dilapidations of Lansdowne House cannot be the subject of an account after the death of the Marquis. The case of an incumbent is an excepted case. In *Lord Castlemain v. Lord Craven*,⁵ it was held that the court never interposes in cases of *permissive waste*. Another ground of demurrer is, that the supplemental bill interrogates to matters interrogated to in the original bill, and answered by the defendant to that bill.

Sir Samuel Romilly, *Mr. Bell*, and *Mr. Shadwell* against the de-

¹ 3 Atk. 262.

² 6 Ves. 73.

³ Lord Eldon.

⁴ 6 Ves. p. 89.

⁵ 22 Vin. Abr. 523, s. c. 2 Eq. Cas. Abr. 758-9.

murrer. In *Garth v. Cotton*, the judgment in which case is given in Dickens,¹ he states the grounds on which he decided *Jesus College v. Bloom*, and says, "It is true, that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument, that a bill for such an account cannot be maintained without praying an injunction."² In *Lee v. Alston*,³ relief was given, though no injunction prayed. Supposing it were true that a bill will not lie for an account of waste, unless where an injunction is prayed; yet here, by the original bill, an account and an injunction was prayed; and if the late Marquis were alive, the court by its decree would have obliged him to account, not only for the waste committed previous to the injunction, but also in respect of the waste committed afterwards, in breach of the injunction, upon the same principle upon which the court acts in tithe cases, where the account is carried on to the time of the decree. It would be monstrous to say, that though a party shall account for waste committed before the injunction, he shall not account for waste done in breach of the injunction. In *Bishop of Winchester v. Knight*,⁴ the Chancellor says, "It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." It may be considered as a general rule, that where a bill would lie against a party when alive, it lies against his representatives after his death; and in such cases, the rule "*Actio personalis moritur cum personā*" does not apply. From *Hambly v. Trott*,⁵ it is clear, that in a case of legal waste the representatives are liable, and the maxim alluded to does not avail; and in analogy to the doctrine at law, a court of equity will make the representatives account for equitable waste, there being no remedy at law.

As to the objection that the supplemental bill contains interrogatories as to matters inquired of by the former bill, and answered, it must be admitted that these defendants have a right to insist on grounds of defense to the original bill, not made use of by the late Marquis; so, the plaintiffs on the other hand, may interrogate as to matters before inquired of by the original bill; especially where, as in the present case, the defendant died so soon after he had put in his answer that there was not time to take exceptions.

With regard to the dilapidations, the court will either order the house to be repaired, as in *Vane v. Lord Barnard*,⁶ or give the plaintiffs a compensation. Supposing, however, this part of the bill can-

¹ 1 Dick. p. 183, s. c. 3 Atk. 751; and 1 Ves. 524, 546.

² 1 Dick., p. 211.

³ 1 Bro. C. C. 194

⁴ 1 P. Wms. 407.

⁵ Cowp. 371.

⁶ 2 Vern. 733, s. c. Prec. Ch. 454.

not be sustained, yet as the demurrer extends not only to this part of the bill, but also to the account of waste committed after the injunction granted, if it is bad as to the latter, it is bad as to the former; for a demurrer cannot be good in part, and bad in part; but if not altogether good, it must be overruled. Where part only of a bill is demurrable, the demurrer must be confined to that part; and if too general, it is bad.

Mr. Leach, in reply. This is a case involving points of great importance. It would be to legislate in a court of equity, if the acknowledged maxim of the law, *Actio personalis moritur cum personā*, is here to be overturned. *Garth v. Cotton* was a case of fraud, and on that ground relief was given. *Bishop of Winchester v. Knight* was a case as to ore dug, which is a sort of trade, and consideration was had there, of the tenure of the estate; the digging of the ore, being by one who held customary lands of the bishop, was considered as a breach of trust.

If the late Marquis had been tenant for life, impeachable for waste, and legal waste had been committed by him, no action could have been sustained against his representatives, because there was no person *in esse*, or, at least, appeared, who had an estate of inheritance; so here, when this equitable waste was committed, there was no owner of the inheritance *in esse*, Lord Wycombe being born since; and yet it is said, as to this equitable waste, the representatives of the Marquis are liable; though had it been a case of legal waste, they would not have been liable. The doctrine in *Hambly and Trott* was not new; it was agreeable to the old authorities. In the case there put, the action against the representatives was held to lie. There, the waste might, by agreement, have been made good, but here, there were no parties who could affirm the waste—it was a wrong, incapable of being made right. The infant tenant in tail was not born when this waste was committed, and yet now claims a compensation as if he had been owner of the inheritance when the waste was committed. It is said, we have admitted that the representatives of the late Marquis are compellable to account for the waste committed before the injunction; and there is no distinction between the waste committed before and after the injunction. I think not; and that the demurrer might have been extended to an account of all the waste committed by the Marquis, whether before or after the injunction; but because the demurrer does not extend as far as it might, it is not therefore bad so far as it does extend.

The VICE-CHANCELLOR. Upon this demurrer, two points are to be considered: 1st. How the case stood as to the deceased Marquis? 2dly. How the case stands as to his representatives? The late Mar-

quis was tenant for life, without impeachment of waste, and as such had a right at law to cut timber on the estate, and had a property in the trees, but having abused that power by cutting ornamental trees, and trees not ripe for cutting, a court of equity says, he shall not do these things with impunity, but interposes to restrain the legal right; and equity not only restrains him from doing further waste, but directs an account of the waste done, and will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate.

A bill was filed against the late Marquis, by Wilmot and Baring, the trustees to preserve contingent remainders, and not by a person having the next estate of inheritance; no such person appearing; but there were contingent remainders, and the present Marquis, the next tenant for life, was entitled to the timber cut, or the substitute for it. The late Marquis did not demur to that bill. Many of the objections taken to this supplemental bill would have applied to the bill filed against the late Marquis. They obtained an injunction, and thereby their competency to sustain the suit was sanctioned; and Garth and Cotton,¹ certainly, was a conclusive authority in support of that suit. The injunction would not have been granted if the trustees had no right to file such a bill. What is said in Jesus Coll. and Bloom, as to not entertaining a bill after the estate of the tenant for life is determined, applies only to cases where legal waste has been committed, and where the party is liable at law in respect of the waste committed; but here it was equitable waste, as to which a court of law gives no remedy. Lord Hardwicke, in that case, says, "the party ought to be sent to law"; which shows he was alluding to legal waste. The party had for such waste a remedy under the statute of Marlbridge,² or might have brought an action of trover; but the court never sends a party to law in cases of equitable waste; they being exclusively of equitable cognizance. As against the late Marquis, therefore, a bill might have been filed, though no injunction were prayed. This court will not permit a man to commit equitable waste, and retain the produce of the injury, which is recoverable in no other court. Relief is given for the benefit of those who come after. The case, therefore, of Jesus College and Bloom is distinguishable from the present. In Garth and Cotton, Lord Hardwicke, alluding to his decision in that case, says, "It affords no conclusive argument that a bill for an account of waste cannot be maintained without praying an injunc-

¹ The judgment in this case is given in 1 Dick. 183, from a copy of Lord Hardwicke's written argument.

² 52 Henry 3, c. 23.

tion."¹ The Marquis died, after having sold, and converted to his use the money produced by his wrongful act; and upon general principles, independent of decision, the assets ought to be liable to pay in respect of his conduct, such assets having been augmented by it.

It has been urged, that if the Marquis had committed *legal* waste, and died, his representatives would not have been answerable, it being a maxim, *Actio personalis moritur cum persona*, and that the same doctrine applies, by analogy, to cases of *equitable* waste. Let us see in what manner this maxim has been interpreted even at law. In *Hambly v. Trott*,² Lord Mansfield says, "When the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labor, or property, of another, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto*, supposed to be *by force*, and *against the King's peace*, there the action dies, as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other cases of the like kind. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating, or imprisoning a man, etc., there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees; but for the benefit arising to his testator for the value or sale of the trees, he shall. So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged."

This I take to be a just exposition of the qualifications under which the maxim, *Actio personalis moritur cum persona*, is received at law; and if equity is to decide in analogy to a court of law, the question in the present case will be, Whether, by the equitable waste committed by the late Marquis, he derived any benefit; or, whether it was a naked injury, by which his estate was not benefited? It is clear it was benefited; and as at law if legal waste be committed, and the party dies, an action for money had and received lies against his representative, so upon the same principle, in cases of equitable waste, the party

¹ *Dick.*, p. 211.

² *Cowp.* 376.

must, through his representatives, refund in respect of the wrong he has done. "It would," says Lord Cowper, in *Bishop of Winchester v. Knight*,¹ "be a reproach to equity to say, where a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." It has been argued, that as when legal waste is committed, and there are no persons in being, or appearing, who could authorize it, or bring an action in respect of the waste, the wrong is without remedy; so here, there being no persons *in esse*, or appearing, when the waste was committed, who could authorize it, a bill will not lie in respect of such waste; but it signifies not, whether such person were *in esse* or not, for waste of this description could not be authorized;—such destruction cannot be authorized;—the court says it shall not be done. The produce of the waste is laid up for the benefit of the contingent remainder-men. To adopt such an analogy to the law, in a case where relief is given against the law, would be singular.

Upon these grounds I think the supplemental bill for an account by the new trustees, the tenant for life, and tenant of the inheritance, was properly brought. The trustees were the proper persons to file the bill against the late Marquis, and the present plaintiffs were the proper persons to file the supplemental bill, though one of the plaintiffs was not *in esse* when the first bill was filed, inasmuch as the money produced by the waste is not to be pocketed, but to be laid up for the benefit of those who in succession will take the estate.

I think the demurrer objectionable on other grounds; but I decide this case upon the broad principle, that where equitable waste has been committed, which never could have been authorized, the court has jurisdiction to make the representatives of the party committing such waste accountable.

Demurrer overruled

SAME CASE.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, M.R., JUNE 28, 1820.

[Reported in 1 Jacob & Walker 522.]

THIS cause, reported in 1 Mad. 116, on the argument of the demurrer, now came on to be heard; an account was directed of the equitable waste committed by the late Marquis; it was agreed that his estate should bear the interest of the mortgages up to the day of his death, and should receive an apportionment of the rents. The only question that remained was that of the account prayed by the bill of the dilapidations permitted in and about the mansion house.

Mr. Shadwell and *Mr. Clayton* for the plaintiffs.

In the case of *Parteriche v. Powlet*,¹ it is laid down by Lord Hardwicke that a tenant for life, without impeachment of waste, must keep in repair the houses of the tenants, and he was accordingly charged with the expenses; the doubt there seems to have been, whether the obligation to repair extended to the houses of the tenants, to which the same considerations do not apply as to the mansion. If, then, this obligation exist, the only remedy to enforce it is in equity. In *Caldwall v. Baylis*,² an injunction was granted against permissive waste, and in a late case of *Lord Ormond v. Kinnersley*,³ the Vice-Chancellor held, that an account of waste might be decreed on the principle of considering the tenant for life as holding, subject to an implied trust to exercise his rights without injury to the remainderman; this principle applies to permissive as well as to voluntary waste, and would entitle the plaintiff to an account of both.

Mr. Heald and *Mr. Ellison* for the defendants.

There is no instance of such an account. In *Caldwall v. Baylis* the defendant had expressly promised to repair, and that case, therefore, turned on different grounds. The cases of *Lord Castlemain v. Lord Craven*,⁴ and *Turner v. Busk*,⁵ are express authorities that there is no remedy in equity against permissive waste.⁶

The Master of the Rolls expressed himself to be satisfied that no account of the dilapidations could be decreed, observing that, with respect to incumbents, the law was otherwise, and, accordingly, suits against their representatives were very common; but no instances of such suits by remainder-men had occurred.

Original Bill.

MARQUIS AND MARCHIONESS OF ORMONDE *v.*
KYNERSLEY.

Bill of Revivor and Supplement.

MARQUIS OF ORMONDE *v.* KYNERSLEY AND OTHERS.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., APRIL 29, 1820.

[Reported in 5 *Maddock* 369.]

THIS bill was filed by the remainder-man against the executor of the deceased tenant for life, whose estate had been unimpeachable of waste, for an account of the produce of ornamental timber, which had been cut by the tenant for life.

¹ 2 Atk. 383. The inaccuracy of the report of this case is observed on by Lord Redesdale in *Clinan v. Cooke*, 1 Sch. & Lef. 35.

² 2 Mer. 408.

³ May 6, 1820.

⁴ 22 Vin. Ab. 523, tit. Waste.

⁵ Ibid.

⁶ See *Wood v. Gaynor*, Amb. 395.

The plaintiff early in 1808 had filed his bill against the tenant for life himself for the same purposes, and had obtained an injunction. The tenant for life put in his answer to that bill on the 1st of June, 1808, and by consent an order was made on the 31st of July, 1808, referring it to the master to inquire as to the ornamental and other timber which had been cut by the tenant for life.

This order was never acted upon; and the tenant for life lived till April, 1815, without any further proceeding being had in the cause.

The present bill was not supplemental to that suit, but to a subsequent original bill. The case was much argued. I was not present at the argument, but am informed that it was, first, contended that such a bill could not be filed, and the following cases were cited, viz.: Bishop of Winchester *v.* Knight,¹ Garth *v.* Cotton,² Hambly *v.* Trott,³ Lee *v.* Alston,⁴ Marquis of Lansdowne *v.* Marchioness Dowager of Lansdowne.⁵ And secondly, that as no timber had been cut since the injunction in 1808, and the plaintiff had not proceeded in the former cause, he must be taken to have waived his claim in that respect.

Mr. Bell, Mr. Benyon, and Sir G. Hampson for the plaintiff. *Mr. Heald* and —— for the defendants.

The Vice-Chancellor held, that though there was much ground for the latter defense, yet, as it was not made by the answer, he could not notice it. Upon the general point, whether such a bill could be maintained, His Honor stated: That the restraint upon the legal owner as to equitable waste was to be considered as founded on a breach of that trust and confidence which the devisor reposed in the tenant for life, that he would use his legal estate only for the purpose of fair enjoyment. That it was a trust implied in equity from the subsequent limitations, and from the presumed intention of the testator that he meant an equal benefit to all in succession. That in all cases, the assets of a testator were answerable for a profit made by breach of trust: and an account was decreed according to the prayer of the bill.

¹ 1 P. Wms. 406.

² 1 Dick. 183; s. c. 3 Atk. 751; and 1 Ves. 524, 546.

³ Cwmp. 376.

⁴ 1 Bro. C. C. 194.

⁵ 1 Maddock 116.

MORRIS v. MORRIS.

IN CHANCERY, BEFORE LORD JUSTICE BRUCE AND LORD JUSTICE TURNER, LORD JUSTICES, DEC. 17 AND 18, 1858.

[Reported in 3 *De Gex and Jones* 323.]

THIS was an appeal by the plaintiffs from an order of Vice-Chancellor Stuart dismissing the bill which was filed to obtain, among other things, compensation out of the estate of a deceased tenant for life for equitable waste in pulling down a mansion-house called Clasemont, in Glamorganshire.

In June, 1819, Sir John Morris, the father, settled the barony of Sketty, in Glamorganshire, and other estates, on himself for life, with remainder to the use of trustees for 1,000 years, upon trusts for raising money to pay off certain charges, and subject thereto to the use of trustees during the life of Sir John Morris, the son, without impeachment of waste (provided the same should be committed or suffered with the privity or assent of Sir J. Morris, the son), upon trust to preserve contingent remainders, and to permit Sir J. Morris, the son, to receive the rents during his life, with remainder to the use of Sir J. Armine Morris for life, without impeachment of waste, with remainder to the use of the first and other sons of Sir J. A. Morris, successively in tail male, with ultimate reversion to the settlor in fee.

The settlor died soon after the date of the settlement, and Sir J. Morris, the son, entered into possession. At this time there was upon the settled estates the mansion-house of Clasemont. This house had, for various reasons, become undesirable as a residence, and the settlor had, for some years before his death, shut it up, and had made some preparations for building another at Sketty, upon part of the settled estates. In 1820, at which time Sir J. A. Morris, the grandson of the settlor, was about nine years old, Sir J. Morris, the son, pulled down the mansion at Clasemont, and soon afterward completed the new one at Sketty, which was much superior to the old one. It was proved in the cause, as satisfactorily as such a fact could be expected to be proved at such a distance of time, that the bulk of the materials of the old house had been employed in erecting the new one, and there was no evidence to show that any part of them had been sold.

In 1847 Sir J. A. Morris obtained an injunction to restrain Sir J. Morris, the son, from cutting down ornamental timber in the grounds at Clasemont,¹ and the order granting this injunction was affirmed by Lord Cottenham.²

¹ 15 Sim. 505.

² 11 Jur. 196.

Sir J. Morris, the son, died in 1855, leaving a will, by which he appointed his widow, Lady Morris, his executrix.

The present bill was filed by Sir J. A. Morris and his eldest son against Lady Morris, asking, among other things, that it might be declared that the pulling down the mansion-house at Clasemont was an act of equitable waste, and that an account might be taken of the application of the materials, and of the profits received by Sir John Morris, the son, from them, and that the amount of compensation to which the plaintiffs might be entitled in respect of such waste might be paid into court.

Vice-Chancellor Stuart dismissed the bill without costs, and the plaintiffs appealed. The bill also raised another question, but as the defendant, upon the hearing of the appeal, did not resist a decree upon that part of the case, and no argument took place upon the point, it is not thought necessary to notice it further.

Mr. Malins and Mr. Archibald Smith for the plaintiffs.

Mr. Bacon and Mr. Speed for the defendant.

The Lord Justice KNIGHT BRUCE. This is not a question of injunction, for the act of which complaint is made was done more than thirty years ago. It is a mere question of equitable debt, in considering which we must look to the particular circumstances of the case. That it was a reasonable, a judicious, and a beneficial thing to pull down the house at Clasemont, and to use the materials, so far as they could be used, for building the mansion at Sketty, is perfectly clear; but I agree with Mr. Malins, that an act may be reasonable, may be judicious, may be beneficial to all the persons interested in a settled property, and yet it may be an act prohibited to a tenant for life, if a person interested in remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness, and on the beneficial nature of what was done, but they are ingredients in it. The estate has been benefited by what has been done, and the plaintiffs are receiving that benefit. Still, if it had been shown, or were in any degree likely, that any part of the materials of the old house had been sold, probably, notwithstanding the much larger expenditure on the construction of the new mansion-house, the assets of the second baronet would have been held liable to account. Here, however, there is no evidence that any part of the materials was sold, and the probability is that no part or no substantial part of them was sold. There is evidence that most of the materials, probably all the materials that were of any value, were applied in building the present mansion-house in a proper position upon the estate. In my judgment it would be unjust, and would be stretching a rule beyond its reason, to make the tenant for life account for the materials of a mansion-

house on the estate, wisely pulled down, when the materials have been so applied in rebuilding. I am of opinion, therefore, that in the circumstances of the present case, there is no ground for directing an account of equitable waste, and the bill ought to remain dismissed, as far as it relates to the materials of the Clasemont house.

The Lord Justice TURNER. I do not rest my decision in this case upon the fact of the estate having been improved by the building of the new mansion-house and the pulling down of the old one; for I am not at all satisfied that the question of improvement or no improvement is one by which the court ought to be guided. I apprehend that the principle upon which the court proceeds in these cases is, that the tenant for life of an estate is liable to account in equity for profit derived by him from an improper user of his legal powers in committing equitable waste. If, therefore, the materials of this house had been sold, and the deceased tenant for life had received the proceeds, in my opinion this would have been a case for an account. But all that can be said in the present case, as to any benefit that has been derived by the deceased tenant for life, is this, that he enjoyed the use of the materials of the old house during his life, in a different state from that in which they originally existed on the estate. They remained on the estate, but they remained as materials attached to a new house, and not to the original house to which they were formerly attached; and I do not find any evidence in the case that there has been any sale of the materials, or any other profit derived by the tenant for life, than by the enjoyment of the materials in an altered state. I think that such enjoyment is not the subject of an account of profits, but that the right to such an account arises only where the tenant for life has disposed of the materials and received the profits. I am of opinion, therefore, that this part of the bill was rightly dismissed.

HIGGINBOTHAM *v.* HAWKINS.

IN CHANCERY, BEFORE SIR W. M. JAMES AND SIR G. MELLISH,
LORD JUSTICES, JULY 18 AND 19, 1872.

[*Reported in Law Reports, 7 Chancery Appeals, 676.*]

MARY HIGGINBOTHAM, by her will, devised certain lands at Alresford, in the county of Essex, to the use of Harriet Higginbotham and her assigns during her life without impeachment of waste except voluntary waste in cutting down any timber other than such timber as might be required for the repairing of the buildings; with remainder as to one moiety to the use of Elizabeth Jones and her assigns during

her life without impeachment of waste except as aforesaid, with remainder to the use of G. Higginbotham and W. Higginbotham as tenants in common in fee; and as to the other moiety to the use of trustees during the life of Ann Becket without impeachment of waste except as aforesaid; with remainder to the use of the eldest daughter of Ann Becket in fee.

Mary Higginbotham died in 1856, and Harriet Higginbotham, the first tenant for life, died in September, 1865, leaving as her executrix Elizabeth Jones, who was the second tenant for life of one moiety.

On the 27th of August, 1870, G. Higginbotham and W. Higginbotham, the remainder-men in fee of one moiety, filed their original bill against Elizabeth Jones, as tenant for life of one moiety, and the other persons interested in the estate, alleging that trees had been felled and sold by Elizabeth Jones and the trustees of Ann Becket, and that other acts of waste were threatened, and praying for an injunction, and for an account of timber cut.

On the 2d of March, 1871, the plaintiffs amended their bill, introducing charges against Elizabeth Jones, as executrix, in respect of timber cut in the lifetime of Harriet Higginbotham, and praying further that an account might be taken of what had come to the hands of Harriet Higginbotham, and of Elizabeth Jones, as well as executrix of Harriet Higginbotham as in her own right, and for payment of what might be so found due to the plaintiffs.

Several defenses were made to this suit, the defendants contending that no waste according to the will had been committed; and Elizabeth Jones contending that there was no right in equity against her as executrix of Harriet Higginbotham; and that if there was, still any claim against the estate of Harriet Higginbotham was barred by the statute of limitations, no timber having been shown to have been cut in her lifetime within six years of the bill being amended as against her representative, and, moreover, it being shown that the remaindermen were at the time aware that the timber was cut, and complained about it.

The Vice-Chancellor Bacon was of opinion that waste had been committed, and granted an injunction and an account of all timber cut since the death of the testator.¹

¹ 1872, March 19. Sir James Bacon, V. C., said he had no doubt that the plaintiffs were entitled to a decree, as the case of waste had been made out. His Honor then said: "Now it has been argued that there can be no remedy against the estate of the late Harriet Higginbotham, and the statute of limitations has been relied upon as an answer to the plaintiffs' claim in that and in other respects. Harriet Higginbotham died less than six years before the filing of the bill; the statute, therefore, in no sense could be an objection to the claim which is made

Elizabeth Jones appealed.

Mr. Fischer, Q. C., and Mr. Key for the appellant.

The right of the reversioner to recover the value of timber cut is a legal right, and has in this case been barred by the lapse of time, which began to run, not from the death of the tenant for life, but from the cutting of the timber.¹ At all events, the plaintiffs have no remedy in equity against the estate of Harriet Higginbotham; the only equity in these cases is the right to an injunction to which the right to an account is attached, and that fails when the tenant for life is dead.² No doubt the present tenant for life is also the executrix of the deceased tenant, but that is an accident.

Their Lordships were of opinion that waste had been committed, and only called upon the respondents as to the waste committed during the life of the former tenant for life.

Mr. Eddis, Q. C., and Mr. Marten for the plaintiffs.

We have a right to follow the money into any hands in which we may find it, and to restore that which has been taken from the estate. Elizabeth Jones is properly brought before the court, and must ac-

against her estate, the charge being that she, while she was tenant for life, had despoiled the estate by converting a part of the inheritance to her own use, and so much, therefore, her estate is liable to make good to the persons interested in the inheritance. As to that I have not heard any answer, except that it was suggested by Mr. Fischer that *Gent v. Harrison* (Joh. 517) was an authority to show that the remedy, if any, was a remedy at law, and that there could be no claim made in this court upon any equitable grounds. Now the case of *Gent v. Harrison* is by no means an authority for that proposition. In that case the tenant who had come into possession of the estate complained that, by the wrongful act of the former tenant for life, the estate had been turned into money, and had been invested, that the proceeds of the investment had been received by the then tenant for life, and that the money so received was the plaintiff's. The answer to that was that he might bring an action for money had and received. How could the plaintiffs here bring any such action? They have no right to the income of any fund, for the timber has been taken from the estate; nor is there any analogy that I can see between *Gent v. Harrison* and the present case. I am of opinion that the estate of Harriet Higginbotham is liable for all that she had done in her lifetime by means of the wrongful cutting, selling, and dealing with the timber." His Honor then said that the plaintiffs were entitled to an account of all the timber cut. If the defendant had any case for allowance to be made to her for what she had done to the benefit of the estate, she could show that on the inquiry. It was said that the amount of timber cut was very small, and ought not to have been the subject of a suit. But that did not at present appear, and the case must come on again for further consideration.

¹ *Garth v. Cotton*, 1 Wh. & T. L. C., 3d Ed. 623, 660; *Gent v. Harrison*. Joh. 517.

² *Jesus College v. Bloome*, 3 Atk. 262; *Seagram v. Knight*, Law Rep., 2 Ch. 628.

count. In *Duke of Leeds v. Earl Amherst*¹ the right was held to have accrued at the death of the tenant for life.

Mr. Kay, Q. C., Mr. Rodwell, and Mr. Field for other defendants.

Sir W. M. JAMES, L. J. In this case the bill was filed by the reversioners under a will, and prayed for an injunction and for an account of timber felled. The injunction was granted, as it appeared that there was legal waste committed by felling trees beyond what was authorized by the will. But what was principally argued before us was with respect to the timber cut during the lifetime of the preceding tenant for life.

Now the mere fact that the present tenant for life was also the executrix cannot make any difference; and to so much of the suit as seeks an account of what was received by the preceding tenant for life there appear to be two answers. In the first place, it is clearly established that a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as incident to an injunction, and that where the plaintiff has no right to an injunction, he has no right to an account, and his remedy is at law alone. In this case the account prayed against the estate of the deceased tenant for life is not incident to the injunction against the present tenant for life.

The second answer is, that the claim is barred by the statute. Beyond all question it appears that there was an immediate right of action. Legal waste had been committed, and the right of action accrued when the wrong was committed, at which time the reversioners might have brought their action for money had and received.

Therefore, in my opinion, the bill has entirely failed so far as regards the account against the estate of Harriet Higginbotham or her executrix in regard to what was done in her lifetime.

As to what was received by Miss Jones after the death of Harriet Higginbotham, she is answerable, and she appears to have received all the money. The plaintiffs are entitled to half of what Miss Jones has so received, and the other half belongs to the family of Mrs. Becket. The sums are very small, and the Lord Justice and I are of opinion that we have materials enough to fix the amounts without putting the parties to any further expense. [His Lordship then stated the amounts.] As the suit has partially failed, there will be no costs.

Sir G. MELLISH, L. J., concurred.

¹ 2 Ph. 117.

PACKINGTON *v.* PACKINGTON.

IN CHANCERY, BEFORE LORD HARDWICKE, C., AUGUST 3, 1745.

[Reported in Dickens 101.]

UPON showing cause for continuing the injunction, which had been granted to stay the defendant, who was tenant for life without impeachment of or for waste, from cutting down trees which were planted, or were standing or growing, in vistas or for shelter or ornament, etc., the plaintiff was going to read affidavits; but Lord Hardwicke, C., said it was unnecessary, for that the plaintiff being the eldest son of the defendant, and the first in remainder after his death, under the defendant's marriage settlement, the defendant, in stating his own rights, must show the plaintiff's, and for that, instead of denying the acts sworn to have been done by him, he admitted them, and insisted on a right under his settlement; but notwithstanding the defendant by his answer says, that although he had threatened to cut down, etc., it was not his intention, and that he did not mean to cut down any more, yet having uttered those threats, and having done what he ought not, it behooved the court to prevent his doing further waste or spoil, and therefore the court continued the injunction.

His Lordship, in the course of his reasoning, put these questions: On showing cause to continue an injunction to stay waste, is the plaintiff confined, as in an injunction to stay proceedings at law, to make out his case from the answer only; and may the plaintiff strengthen his case by affidavits?

His Lordship said the plaintiff might read the answer to show his right, and might also read affidavits to make out the waste.

ATTORNEY-GENERAL *v.* BURROWS.

IN CHANCERY, BEFORE LORD HARDWICKE, C., MAY 6, 1747.

[Reported in Dickens 128.]

THE defendant's denying he had committed waste since the filing of the bill, Lord Hardwicke, C., said was not an inducement to refuse an injunction; for as he admitted he had done waste, he might do further waste.

Suppose it had been the first time a doubt had arisen respecting the admission of proof in support of an injunction to stay waste, it is submitted whether the defendant, by taking notice of the affidavits upon which the injunction was founded, and saying they were almost wholly untrue, doth not call upon the court to inquire what those affidavits are. The court is concerned; for if untrue the court was imposed upon, and misled to grant the injunction: if true, the same reason will hold for continuing as there was for granting the injunction; and further, the defendant, by saying that part of the affidavits was untrue, is in effect admitting the other parts to be true; and that part may be such as to warrant the injunction

J. D.

SKELTON v. SKELTON.

IN CHANCERY, BEFORE LORD NOTTINGHAM, C., NOVEMBER 16, 1677.

[Reported in 2 Swanston 170.]

THE bill was exhibited against a jointress to stay *moresme* in felling timber, and notwithstanding the defendant's answer, who claimed the inheritance by a deed which the plaintiff controverted, an injunction was obtained until hearing; and now, at the hearing, she proved herself to be a jointress in tail; and it was urged by Mr. Attorney, that the defendant being a jointress within the statute of 11 H. 7, which restrains all power of alienation by fine or discontinuance, she ought likewise to be restrained in equity from committing waste, which is also in disherison of the heir. But this I would by no means allow, that equity should enlarge the restraints or the disabilities introduced by act of Parliament; and as to the granting of injunctions to stay waste, I took a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If the tenant have only a bare indemnity, or exemption from an action if he committed waste, there it is fit he should be restrained by injunction from committing it; but if he have a right in the thing itself, when it is wasted and cut down, there it is no way reasonable that he should be restrained: as, for example, if there be tenant for life, the remainder for life, the reversion in fee; here the tenant for life has no right nor power to fell timber or commit waste; yet if he do so he cannot be punished for it in an action of waste, during the life of him in the remainder for life; for that intervening remainder is an impediment to the action; so it is most just to grant an injunction to stay waste; and so it was ruled in the Chancery by advice of judges, P. 41 El. Sir F. Moor, 554, pl. 748; and Egerton, C., said he had seen a precedent of such an injunction, 5 R. 2, and so it had been done before, temp. E. 6, Vandemot v. Eyr: and with this agrees 16 Jac. B. R., 1 Roll. 377, pl. 13, *per curiam*. And the reason of this is most convincing; for when such a tenant for life hath cut down the trees, he in the remainder in fee may take them away, notwithstanding the mean remainder for life, or he may have a trover and conversion against the tenant for life, if he remove them; which shows that such tenant for life hath no property in the trees; it were, *ergo*, most absurd to put the reversioner to recover damages for his inheritance in the trees, or to seize them as chattels, when they may better be preserved to him in specie, by granting an injunction to stay the felling of them. And upon the like reason it may seem that tenant after possibility may be restrained by injunction from committing waste, for so if he fell trees

the reversioner may have a trover and conversion, as was held 24 Car. 1; *B. R. Udal v. Udal's case*, p. *Rolle et curiam*; and yet *temp. E. R. placita parliament.* (Ryley, Appendix, 653.) Kirbrok petitions “*quod breve de waste poe giser versus Roger son frere*” (against Maud, the widow of Roger) “tenant in tail, apres possibilité; Response, ley nest mye uncore ordein en ce cas.” Probably this was before 21 Ed. 3, for in 21 Ed. 3, Rot. Parl. n. 46, the commons petition for a general law, that tenant after possibility might be liable to an action of waste, as being in effect but tenant for life, yet could not obtain it; but this serves only to keep the tenant after possibility in a state of impunity, if he commit waste, not to give him a right to commit it. On the other side, if there be tenant for life, with an express charge to hold without impeachment of waste, he is not to be restrained by injunction, for he hath more than a bare impunity, viz., a right in the trees to fell them; *à fortiori*, in the case in question, no restraint can be put upon a jointress in tail who hath the inheritance; and yet all this notwithstanding, he that hath a lawful power and liberty to commit waste may be restrained by Chancery from using this power, when the waste which he is about to do is signally *contra bonum publicum*, (V. 19 Car. 1, B. R. 1 Roll. 380, T. 3), though a lease for years was made without impeachment of waste by the Bishop of Winchester, yet when the lessee for years, towards the end of his term, was about to cut up all the trees, an injunction was awarded by the advice of all the Judges, *pro bono publico*, and in favor of the church, whereof the King is patron, notwithstanding the agreement of the parties. But in my Lord of Orford's case, where the Earl was tenant for life without impeachment of waste, the reversion in fee to the co-heirs of the Lady Banning, and the Earl was about to pull down a house near Colchester, no injunction could be obtained, but the co-heirs and Sergeant Peck, who was a purchaser from one of them, were fain to compound with the Earl. So it seems there is some discretionary latitude in these cases; but that which is more remarkable is, that he who hath a power to commit waste may sometimes be restrained from the exercise of that power, when it tends only to a private damage; as for example, the Lady Evelyn was tenant for life in jointure, remainder to Sir John Evelyn, her eldest son, for life, without impeachment of waste, with several remainders over; the jointress let the land to a tenant at will; Sir John Evelyn enters by consent of the undertenant, and cuts down trees; resolved, though no injunction had lain against Sir John Evelyn if his remainder had fallen into possession, yet now it does; for although the license of tenant at will to enter excuse the entry from being a trespass, yet no possession by such entry can enable him to cut down the trees pres-

ently, for the jointress hath right during her life to the shade and the mast ; and to reasonable bootes ; *ideoque* Lord Bridgman, Custos, awarded an injunction during the life of the jointress. (1 Dec. 1670, 22 Car. 2.) Lord Nottingham's MSS. : "This court sees no color of cause to give the said plaintiff any relief in this court, and doth therefore think fit and order that the matter of the said plaintiff's bill be from henceforth clearly and absolutely dismissed out of this court ; and it is hereby referred to Sir J. F., etc., to tax the said defendants their moderate costs of this suit." (Reg. Lib. B., 1677, fol. 33.)

ABRAHALL *v.* BUBB.

IN CHANCERY, BEFORE LORD NOTTINGHAM, C., JULY 1, 1679;
MAY 27, 1680.

[*Reported in 2 Swanston 172.*]

THE bill supposed the defendant's wife to be tenant in tail after possibility, by the provision of a former husband, and prayed she might be restrained from committing waste ; the defendant demurred; yet I ordered him presently to answer *quoad* the house and trees about it, *pro bono publico* ; but the next morning I ordered him to answer the whole bill, upon the reason of the case, Skelton *v.* Skelton, because tenant after possibility has only *impunitatem*, not *jus in arboribus*, for he in reversion may have a trover when they are felled.

The importunity of the parties being great, I restrained only mischievous waste, which might deface the seat, but gave way that trees marked out by the ancestor for payment of his debts might be felled; yet I continued in the same opinion, that where he in the reversion might have a trover for the trees when felled, there the court ought to grant an injunction to stay the felling, and that I took to be this case; and I observed that the opinion that tenant after possibility is disipunishable of waste, was an addition to Mr. Littleton, and no part of the original text; but, however, it is one thing to have impunity, and another to claim right in the trees; the very act of the party who grants an estate without impeachment of waste, has not always been understood to transfer a property in the trees, as may appear by Herlakenden's case; and so at this day, the usual form of conveyances is, after the words without impeachment of waste, to add a clause. and with full power and authority to do and to commit waste, which shows that this is taken to be somewhat more than the former words do necessarily imply; and the case is put in my Lord Dyer, where an estate without impeachment of waste was granted upon condition not

to commit voluntary waste, and held to be a good condition, and consistent with the grant. If the act of the party be so tenderly construed to prevent waste, the act of the law ought to be bounded with more circumspection. But hereafter, when any such case shall happen again, it may be fit to direct that a trover and conversion be brought for felling some oaks, which shall be admitted to be cut; and as the law shall be judged in a trover, accordingly to grant or deny a perpetual injunction, and in the mean time to stay waste.¹

VANE v. LORD BARNARD.

IN CHANCERY, BEFORE LORD COWPER, C., JANUARY 24, 1716.

[Reported in 2 Vernon 738.]

THE defendant on the marriage of the plaintiff, his eldest son, with the daughter of Morgan Randyll, and £10,000 portion, settled (*inter alia*) Raby Castle on himself for life, without impeachment of waste, remainder to his son for life, and to his first and other sons in tail male.

The defendant, the Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, and boards, etc., to the value of £3,000.

The court, upon filing the bill, granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August, 1714; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant, the Lord Barnard; and decreed the plaintiff his costs.²

¹ Lord Nottingham's MSS.² This case is reported under the name of Lord Bernard's Case, as follows, in Precedents in Chancery 454:

"Lord Bernard was tenant for life, without impeachment of waste; and this bill was brought against him by those in remainder, for an injunction to stay his committing of waste; and by the proofs in the cause it appeared, that he had almost totally defaced the mansion-house, by pulling down great part, and was going on entirely to ruin it; whereupon the court not only granted an injunction against him, to stay his committing further waste but also ordered a commission to issue to six commissioners, whereof he to have notice, and to appoint three on his part: or, in default thereof, the six commissioners to be named *ex parte*, to take a view, and to make a report, of the waste committed; and that he

BISHOP OF LONDON *v.* WEB.

IN CHANCERY, BEFORE LORD PARKER, C., HILARY TERM, 1718.

[Reported in 1 Peere Williams 527.]

BISHOP BONNER in the time of Edward the Sixth, being then Bishop of London, made a long lease of some lands in Ealing in Middlesex, in which there are about twenty years yet to come, and the lease was made without impeachment of waste, and the defendant Web, in whom by several mesne assignments the remainder of this lease was vested, articed with some brickmakers, that they might dig and carry away the soil of twenty acres six feet deep, part of the premises, provided they did not dig above two acres in the year, and levelled those acres before they dug up others.

The Bishop of London, having the inheritance of the premises in right of his bishoprick, brought a bill to enjoin the digging of brick in this manner, alleging that this was carrying away the soil, part of the inheritance, and would in consequence turn the pasture field into a pit or pond ; that it was like the case of Vane *v.* Lord Barnard, where Lord Barnard, having upon his marriage settled Raby Castle (the family seat) upon himself for life without waste, remainder to his first, etc., son of that marriage, afterwards, upon some displeasure taken against his son, employed several persons to pull down the castle, upon which the court granted a perpetual injunction to stop him, and ordered him to amend and repair what he had pulled down ; for that he should not destroy the thing itself, which he had expressly settled. So in this case the defendant, in digging all the soil for bricks, was actually destroying the field.

But for the defendant it was said that frequent experience showed that the digging of brick did not destroy the field, there being many fields about the town where brick had been dug, and those fields now used again for pasture ; but admitting it was waste, yet there being a power to commit waste, the lessee might do it, as well as open a new mine, and carry away the mineral, without filling it up again.

On the other side it was replied that the privilege of being *sans* should be obliged to rebuild, and put it in the same plight and condition it was at the time of his entry thereon and it was said, that the like injunctions had frequently been granted in this court ; and that the clauses of *without impeachment of waste* never were extended to allow the very destruction of the estate itself, but only to excuse from permissive waste ; and therefore, such a clause would not give leave to fell and cut down the trees which were for the ornament or shelter of a house, much less to destroy or demolish the house ; and so it was ruled in my Lord Nottingham's time, 2 Chan. Cases, 32." —ED.

waste would not in equity entitle one to pull down an house, or even cut down trees that are for the ornament of the house.

THE LORD CHANCELLOR. Before the statute of Gloucester, waste did lie against lessee for years, and the being without impeachment of waste seems originally intended only to mean that the party should not be punishable by that statute, and not to give a property in the trees or materials of an house pulled down by lessee for years *sans* waste; but the resolutions having established the law to be otherwise, I will not shake it, much less carry it further.

But I take this to be within the reason of Lord Barnard's Case, where, as he was not permitted to destroy the castle to the prejudice of the remainder-man, so neither shall the lessee in the present case destroy this field, against the bishop who has the reversion in fee, to the ruin of the inheritance of the church.

Let the defendant carry off the brick he has dug, but take an injunction to stop further digging.

ROLT *v.* LORD SOMERVILLE.

IN CHANCERY, BEFORE LORD HARDWICKE, TRINITY TERM, 1737.

[*Reported in 2 Equity Cases Abridged 759.*]

THE case in effect was thus: A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant the Lord Somerville) for life, without impeachment of waste, remainder to the plaintiff Rolt for life, without impeachment of waste, with several remainders over. The defendant the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold the same, and also took up lead water pipes that were laid for the conveyance of water to the capital messuage, and disposed thereof, and he also cut down several groves of trees that were planted for the shelter or ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life without impeachment of waste, and therefore he was not liable to be called to an account for what he had done either in law or equity, and if he was, yet the plaintiff could not call him to an account, because he was not a remainder-man of the inheritance.

LORD CHANCELLOR HARDWICKE. Though an action of waste will

not lie at law for what is done to houses, or plantations for ornament or convenience, by tenant for life without impeachment of waste, yet this court hath set up a superior equity, and will restrain the doing such things on the estate. In Lord Barnard's Case the court restrained him from going on, and ordered the estate to be put in the same condition. In Sir Blundel Charleton's Case the Master of the Rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament or shelter of the estate, this court would have interposed; but here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance, yet as to the pulling down the houses and buildings, and laying the lead pipes, they may be restored, or put in as good condition again. In the case of my Lord Bernard there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his lifetime. The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.¹

ROBINSON *v.* LYTTON.

IN CHANCERY, BEFORE LORD HARDWICKE, C., DECEMBER 12, 1744.

[*Reported in 3 Atkyns 209.*]

THE father of the plaintiffs and defendant, by his will devised to the defendant, his son John Robinson Lytton, "the lands upon which the question arises, to him and his heirs forever, and in case he should not live to twenty-one, and die without issue, he gave the lands to his

¹ I have been informed that this cause of Rolt and Lord Somerville was afterwards referred to two friends and amicably settled.

² This case is reported as follows in 8 Viner's Abridgment 475, placitum 16:

"A man devised to the now defendant by the name of his youngest son John and his heirs, all his estates in W. and in case his son should not live to attain the age of 21, leaving no issue lawfully begotten, he devised the estates to the plaintiff Elizabeth his eldest daughter and the heirs males of her body, with like limitations over to his other daughters; and in case his son should attain the age of 21 years, then he devised the estates to be sold, and the money arising from such sale he devised amongst all his daughters as an augmentation to their fortunes. There was a great deal of timber upon the estate, which John the son was cutting down, and now they moved for an injunction to stay him.

daughters (who are the plaintiffs) with several remainders over; then he goes on, and says, my will is, in case my son shall not attain twenty-one, my estate shall be sold, and the money divided among my daughters, for an augmentation of their fortunes, and gave to his daughters £10,000 besides."

The estate which came to the son by settlement, was between three and four thousand pounds a year.

The son, who wants about three-quarters of a year of coming of age, intends cutting down three thousand pounds worth of timber off the estate.

"Solicitor-General for the injunction said, there were many cases where this court would grant such injunctions in favor of persons not intitled to an action of waste at law, as where there is tenant for life, remainder for life, reversion in fee, so for an infant in *ventre sa mere*, and cited Freeman's Reports, Trin. Term 1680. And Lord Chancellor was of opinion, that he ought to grant an injunction; he said he thought he was to be considered as a trustee of the inheritance for the benefit of the daughters, and that it was the intention of the testator, he thought, to give him the beneficial interest, but that it would be strange if he was to take away under such a devise the greater part perhaps of the estate.

"He said, though there had been no case determined where this court had granted an injunction to stay waste for an infant in *ventre sa mere*, yet he should not scruple to do it if such a case should happen, and he should be inclined to restrain an heir-at-law in case of an executory devise.

"Injunction granted, and made perpetual.

"Note, the particular reason upon which he founded his judgment he declared to be, because he looked upon the devisee John as a trustee by the intention of the testator."

This case is reported as follows in 6 Cruise's Digest of the Law of Real Property, 427:

"Robinson Lytton devised all his estates out of settlement to the defendant, his only son, and to his heirs and assigns forever. And in case his said son should not live to attain the age of twenty-one years, leaving no issue by him lawfully begotten, then and in such case he gave his said estate to his first and every other daughter in tail. And he further directed that, in case his said son should attain the age of twenty-one, his estates in London, Sussex, etc., should be sold; and the moneys arising from such sales he gave to all his daughters, the plaintiffs, in equal proportions, as an addition to their fortunes; and in case one or more of his said daughters should die, then her share to go to the survivors.

"The testator died in 1732, and the defendant, his son, being still under age, and going to cut down timber, the plaintiffs brought their bill for an injunction to stay the defendant from felling timber, as contrary to their father's will, who intended them the whole benefit of the estates in question, in case his son should attain twenty-one.

"For the defendant it was insisted that by the express words of the will he had the fee in him, which could be divested only upon a contingency that might never happen; and that the court would not restrain a person having the inheritance, from committing waste. That it was unreasonable to put a man in a

The bill is brought by the daughters amicably, for an injunction to stay waste, and in order to have the opinion of the court on this point, whether the defendant had a right to cut down the timber.

LORD CHANCELLOR. If the defendant has a legal right, and there are no equitable circumstances to restrain him, I shall not do it.

But though he may have a legal right, yet if there are equitable circumstances he may be restrained, and it is not proper for me to give a liberty in doubtful cases.

worse state, with regard to his own interest, because after his own interest determined, he had one for a third person, and cited *Savil v. Savil*.

"LORD HARDWICKE. If the defendant has a legal right to cut down timber and there be no equitable circumstances in the case, he ought not to be restrained from the exercise of this right; but if there be any such, he ought I did not think fit to determine the matter upon a petition, but thought it proper for a bill. As to the testator's intent, he never meant that his son should, before he attained twenty-one, fell all the timber on these estates, which were devised to be sold for the increasing his daughters' portions; and it might happen that the value of the timber when felled would equal or perhaps exceed that of the land; and his meaning must have been to give it of the same value it was at his death, which must be the same timber that was on it at that time. Suppose the greatest part of this estate were meadow ground, and the defendant was going to plough it, by which he would greatly increase his present profits, but reduce the value of the land, by turning it into arable, would not the court in such case grant an injunction? Certainly it would. The testator has given his son these estates only for a time, during which, in supposition of law, no waste will be committed,—that is till the defendant attains twenty-one. For what guardian could cut down timber, and by that means turn part of the inheritance into personal estate? and this is a very material circumstance with regard to the testator's intent. The next consideration is, what are the words of this will which, putting the two clauses together, amount to a gift of all his estates which he had power over, to his son forever; and that, in case his son shall attain twenty-one, then that the estates shall be sold, and the moneys arising therefrom he gives to his daughters, by way of augmentation of their portions. Upon which it was said, by the plaintiff's counsel, that the defendant is to be considered as a trustee of the inheritance, for the benefit of his sisters; and I am of opinion he is so, taking the profits to his own use until he attains twenty-one. This court has gone greater lengths in granting injunctions to stay waste than the courts of law have in granting prohibitions against waste,—as where there has been an interposing estate for life, remainder in fee, in which case no action of waste lies during the continuance of the mesne remainder (1 Inst. 54) And injunctions have been granted to the remainder-man, notwithstanding the interposing estate for life. So where there has been tenant for life, remainder for life, without impeachment of waste, remainder in fee, the court has restrained the remainder-man for life, during the continuance of the first estate for life, because of the possibility of his dying before the first tenant for life. The like in mortgages, where a mortgagor has been in possession, the court has restrained him from cutting down timber, without inquiring whether the estate itself was sufficient to answer. Now this is much stronger in the case of a trustee; and here it is the same as if he had said, 'I give

As to the intention of the testator, he certainly had not the least thought that the son, before his age of twenty-one, should fell all the timber upon the estate.

The inheritance is constituted of the land and timber upon it, and that is devised to be sold for the benefit of his daughters.

The intent was to give the value of the estate at the time it was devised.

A person having meadow ground might as well make it arable.

What is the will?

The clauses must be construed as if they were in one and the same clause.

Suppose the last clause had been first, the defendant would have been considered as a trustee of the inheritance for the benefit of the daughters; and that is the point I shall ground the injunction upon to stay waste.

This court has gone greater lengths to stay waste than the courts of law have in giving actions, or granting prohibitions against it.

As where there is tenant for life, remainder for life, remainder in fee; so where there is tenant for life subject to waste, remainder for life dispusnifiable for waste, remainder in fee, the court will not suffer

this estate to my son and his heirs, to the intent he may receive the profits till twenty-one, and after twenty-one then to be sold for my daughters' portions.' In which case the court would certainly have restrained the defendant.

"There are three kinds of interest taken notice of in this court,—the legal estate at common law; the use, which now, by 27 Henry VIII., draws the legal estate to it; and the beneficial interest. Now how does it stand upon this devise? The legal interest is in the defendant; and as to the beneficial interest that belongs to him till twenty-one, and then the whole is a trust for the benefit of other persons. If he does not attain twenty-one, and leaves no issue, the estates go according to the several remainders limited thereon. If he does, they are to be sold for augmentation of the daughters' fortunes. It would therefore be unreasonable to suffer him to take away a considerable part of the value of estates intended for daughters' portions; nor will the court enter into the value of these portions, nor of the proportion they bear to the son's estate, the father being the proper judge of the division of his property in his family.

"Several cases have been put upon waste, which have never been determined; only the court *arguendo* has said it would do so or so,—as that of an infant in *ventre sa mere*, where the estate descends in the mean time to the next heir. It has been said several times that the court would grant an injunction to restrain the heir from waste, and I should certainly do it. So in such executory devises as must take place within a reasonable compass, as in Gore *v.* Gore, where the freehold descends in the mean time, I doubt whether such an heir should be permitted to commit waste, and think he ought to be restrained. This injunction, therefore, must be made perpetual, there being no other way to preserve the benefit which the testator intended his daughters, but without costs on either side."—ED.

an agreement between the two tenants for life to commit waste, to take place against the remainder-man, before the time comes when the second tenant for life's power commences.

So, in mortgages and securities, where the mortgagor has been in possession, it is always granted, because the whole estate is a security, but the court does it more strongly where there is a trust.

The clause in this will amounts to as much, as if he had said, I give my estate to my son and his heirs, till twenty-one, to receive the profits, then to increase my daughters' portions ; and here there could be no doubt but the court would have done it.

There are at this day three sorts of estate in lands ; the legal estate, that is the fee or freehold.

Secondly, the use, which by the statute draws the legal estate after it.

Thirdly, the beneficial interest.

How does it stand upon this devise ?

There is an undoubted estate in fee in the defendant, and he may receive the profits till twenty-one.

This amounts to a devise of the beneficial interest to him for that time, and it would be very extraordinary to suffer him to take away a great part of the inheritance of the estate, which was directed to be sold, not for strangers, but for the benefit of the daughters for their portions.

The father is to judge of the provision for his children.

After giving the daughters £10,000 he then directs this shall go in augmentation.

There have been several cases put which have never been determined, as that of a child *in utero sa mere*, but always said *arguendo*, and I should make no scruple in such a case to grant an injunction.

Suppose the case of an executory devise, as in *Gore v. Gore*, I should doubt whether the heir-at-law ought not to be restrained from committing waste in the mean time.

I am therefore of opinion, the injunction ought to be made perpetual.

It is pursuing the intention of the testator, and preserving the value of the estates intended to go to his daughters.

TURNER *v.* WRIGHT.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., MARCH 28, 1860.

[*Reported in Johnson 740.*]

E. WRIGHT, of Brattleby House, in the county of Lincoln, being entitled in fee simple to an estate and mansion-house at Brattleby and an estate in North Kelsey, by his will, dated September 3, 1853, charged his said mansion-house and estate in Brattleby and North Kelsey with the payment to his sister, Mary Wright, during her life, of a rent-charge of £300, and, subject thereto, devised all his said mansion-house and estate in Brattleby and North Kelsey aforesaid, with the appurtenances, to the use of his brother, the defendant, the Reverend W. Wright, in fee; but in case he should die without leaving issue living at the time of his decease, then the testator devised his said mansion-house and estates, with the appurtenances, to the use of his said sister and her assigns during her life, without impeachment of waste, with remainder to the use of the plaintiff, Samuel Wright Turner, in fee; but if he should die without leaving issue male living at the time of his decease then the testator devised his said mansion-house and estates to the use of the eldest son of the Reverend Dr. Parkinson in fee, but in case such eldest son should die before he should become entitled to the possession or to the receipt of the rents and profits of the said testator's said estate thereinbefore devised, the said testator devised his said mansion-house and estates to the use of the second son of the said Dr. Parkinson in fee; and the testator thereby provided that the plaintiff should, within one year after becoming entitled to the possession or to the receipt of the rents and profits of the said estates, take the name and arms of the testator or forfeit his interest in the said estate.

The testator died on August 9, 1857, and Mary Wright had since died. The defendant, William Wright, entered into possession of the estates, and had had no issue up to the date of the bill. The defendant had cut some and marked for cutting other timber on the Brattleby and North Kelsey estates, and had advertised a sale thereof. Some portion of the timber so cut and marked on the Brattleby estate was alleged to be ornamental and other portion immature. The plaintiff filed this bill praying an injunction to restrain the cutting of any timber, or at any rate of any ornamental or immature timber, and for an account of the timber already cut.

Mr. Rolt, Q.C., Sir H. Cairns, Q.C., and Mr. Kay, for the plaintiff.

The defendant has no right to cut any timber. The foundation of the doctrine as to waste is the intention of the testator, and it is clear

on this will that the estate in its integrity was meant to go to the successive takers. The power of committing legal waste is expressly given to the tenant for life, and not being given to the defendant, he is not entitled to cut timber, whether ornamental or not. If a gift of personality had been made in similar terms, the person entitled in reversion would have a right to have the fund secured, and so here the plaintiff may have the estate secured by an injunction against waste. It is not generally possible to destroy the whole value of an estate in real property, though in the case of houses, and especially of chambers on an upper floor, it would be so. But a partial destruction will be restrained on the same principle. The defendant claims, by virtue of the quality of his estate in fee, the right to commit any kind of waste; but it is clear that he could not pull down the mansion house, because that would be to destroy the thing which, in certain events, is given over. Cutting timber is equally pro tanto a destruction of the inheritance; for timber is not part of the profits, but of the inheritance.¹

[The VICE-CHANCELLOR. Lord Redesdale says the contrary in *Wright v. Atkyns.*]

Lord Redesdale's statement is opposed to all the old authorities. *Robinson v. Litton*² is an express authority that tenant in fee, subject to an executory devise over, may be restrained from committing waste; and this was approved by Lord Eldon in *Stansfield v. Habergham*.³

The only authority which seems adverse is *Wright v. Atkyns*,⁴ reported on appeal before the House of Lords in Sugden's Law of Real Property;⁵ but the power given to Mrs. Atkyns in that case, of conferring estates on other persons which would entitle them to cut timber, was the reason why she was held not to be impeachable herself. The analogy of spiritual corporations applies, who may be restrained from committing waste, though they have estates of inheritance.⁶

The right to a prohibition was at common law, and before the Statute of Marlebridge it was wrong in tenant for life to commit waste, though the remedy was deficient; and tenant in dower could always be prevented from committing waste. Another analogy is

¹ *Bewick v. Whitfield*, 3 P. Wms. 267; *Garth v. Cotton*, 1 Wh. & T. Lead. Cas. 451; *Lewis Bowle's Case*, 11 Rep. 79.

² 3 Atk. 209.

³ 10 Ves. 273.

⁴ 17 Ves. 255; 19 Ves. 299; 1 V. & B. 313; *Tur. & R.* 143, 147.

⁵ Page 376.

⁶ *Vin. Abr. A.*, "Waste," *Bishop of Winchester v. Wolgar*, 3 Swanst. 493, note; *Acland v. Atwell*, 3 Swanst. 499, note; *Wither v. Dean and Chapter of Winchester*, 3 Mer. 421; *Herring v. Dean and Chapter of St. Paul's*, 3 Swanst. 492; *Duke of Marlborough v. St. John*, 5 De G. & Sm. 174.

furnished by the case of tenant in tail after possibility, who cannot cut timber.¹

When a testator expressly gives an estate for life, sans waste, making the tenant for life the very owner of the timber, the court restrains equitable waste, because it sees that the intention is that such waste should not be committed. So, by analogy, where it sees, as here, an intention that no waste should be committed, it will restrain even legal waste.

[The VICE-CHANCELLOR said that he had no doubt the defendant had rights as extensive as those of a tenant for life without impeachment of waste, but called upon the defendant's counsel on the question as to equitable waste.]

Mr. Daniel, Q. C., and Mr. Speed, for the defendant.

The intention of the testator is shown by the estate he gives. By making the defendant tenant in fee, he meant to give him all the rights incident to the fee simple, except so far as he limited them by the contingent executory devise over. The power of disposition only is qualified by the gift over, and the nature of the defendant's dominion over and enjoyment of the estate is unaffected by it.

A tenant in tail has the right to commit waste, and this is not merely because he can bar the entail, for the same was held where the power of barring the entail was taken away by statute.²

As to Robinson *v.* Litton, it appears by the note in Atkyns that no decree for a perpetual injunction is to be found in the Registrar's book.

[The VICE-CHANCELLOR. The case was much discussed in Garth *v.* Cotton, and you must take it as a clear decision on the point by Lord Hardwicke from which he never wavered.]

The real ground of that decision was, that, under the terms of the will, the son was in certain events a trustee. The report in Atkyns does not state the will correctly. In 6 Cruise 427, and in Viner, Dev. 475, the trust for sale is stated to arise if the son attains twenty-one, instead of in the opposite event, as stated in Atkyns. The judgment shows that Cruise's report is correct, and that the ground of decision was that the son was a trustee of the inheritance.

[The VICE-CHANCELLOR. That would explain Lord Redesdale's observations in Wright *v.* Atkyns, that Lord Hardwicke seems to have considered it a chattel interest; but if Atkyns' report is wrong, it is strange that it should have been relied on without remark in the case of Garth *v.* Cotton, before the same judge, not very long afterwards.]

¹ Abrahall *v.* Bubb, 2 Swanst 172, note; 2 Sho. 69.

² Peirs *v.* Piers, 1 Ves. 521; Attorney-General *v.* Duke of Marlborough, 3 Madd. 498.

There is no jurisdiction to restrain a tenant in fee, unless he is in some event a trustee, from committing any kind of waste.

Mr. Rolt, in reply. Even if the report of *Robinson v. Litton* in *Cruise* be the correct one, there are three events, namely: the son attaining twenty-one; dying under twenty-one, leaving issue; and dying under twenty-one without issue; and in the last of these the estate in fee became absolute in him. Nevertheless he was restrained, and the same principle will apply in any case where the estate is on any contingency to go over to others.

VICE-CHANCELLOR SIR W. PAGE WOOD. The question as to equitable waste is of some nicety. As to the rest of the case I have felt no doubt. The contention has been carried as high as this, that a person who takes a fee simple, subject, in certain events, to an executory devise over, is not entitled to cut any timber whatever. The argument in support of this contest was founded on this principle, that the gift over necessarily involved an intention that the whole estate should go over as it existed in the testator's hands. The will describes the subject of the disposition as a mansion house, lands, and other particulars; and it is said, that, upon the terms of this instrument as well as upon general principle, it must be held that the estate was to go over in the event contemplated, unimpaired. In support of this view it was said that in *Robinson v. Litton* Lord Hardwicke had restrained a tenant in fee from cutting timber before he attained twenty-one, and that in the case of *Stansfield v. Habergham* Lord Eldon not only recognized this doctrine, as he certainly did, but asserted as a general principle that the court would interfere even upon a legal executory devise. The particular case before him did not call for the expression of any opinion on that point, and the observation relied on can therefore only be taken as a dictum worthy of that attention which everything falling from such an authority commands.

Wright v. Atkyns is not in itself of a conclusive character. If you assume the principle of *Robinson v. Litton* to be that a tenant in fee, subject to an executory devise over, may, upon the presumed intention, be restrained from committing waste, *Wright v. Atkyns* would not be at variance with it.

Mrs. Atkyns took subject to a direction in the will, by which the testator expressed his confidence that she would dispose of the property at her death in favor of his family. In the first instance Sir W. Grant held that she took only a life interest, and that subject thereto there was a trust for the heir. An injunction against waste followed as a necessary consequence of that decision. Lord Eldon upheld the decision both as to the construction and the injunction. The

House of Lords reversed the decree so far as it limited Mrs. Atkyns' interest to a life estate, but pronounced no decision as to any future question touching the construction of the will, and also reversed the order for the injunction, so far as it was founded on the dictum that Mrs. Atkyns was only tenant for life.

The case came again before Lord Eldon. It could not be decided until Mrs. Atkyns' death who would be the persons interested in the estate, and Lord Eldon thought the whole matter involved in so much doubt that he made an order for the protection of the property in the meantime. On a second appeal, the House of Lords reversed that order of Lord Eldon's, and held that Mrs. Atkyns had the ordinary rights of a tenant in fee simple. No question of equitable waste arose. There is one sentence of Lord Eldon's judgment, as stated in the short note in Lord St. Leonards' book, pp. 383, 384, which explains how the case came to be determined against his decision without any distinct opposition on his part. The observation I refer to is at the conclusion of the judgment: "And yet if she can give it to a tenant for life, sans waste, is she to take a less interest? It depends upon intention only."

Lord Redesdale expressly puts the case on this ground. After discussing the various views suggested, he asks,¹ "Can any one have a doubt of the testator's intention in giving her the fee to give her all the rights and enjoyments during her life of a tenant in fee? Under subsequent words the persons are to take by her devise. They take out of her fee simple, which fee simple is only controlled by the condition. They say she is to devise the property as it is. Then she is to devise more than she takes, for they say she takes no interest in the timber. She is to give to them by her will more than she takes by herself."

What I apprehend he meant by this is, that it would be unreasonable to assume, that, being endowed with a power of disposition of this kind, she should not have the same power during her life which she could confer on her appointees after her death. And this seems to have struck Lord Eldon as distinguishing that case from a gift of the fee with an executory devise over. When such a gift over takes effect, it does so altogether dehors the tenant in fee as if there had been no estate in him. Mrs. Atkyns, on the other hand, was intrusted with a power of distribution among the members of a class on whom she could confer the same estate which she held herself. That seems to distinguish *Wright v. Atkyns*; and therefore, so far as that case is concerned, it is open for the plaintiff to contend for the right which he asserts.

¹ P. 387.

It is unnecessary for me to express any opinion as to the general point, whether a legal tenant in fee subject to an executory devise over can in any case be restrained from committing legal waste. It is sufficient to say that, when you examine *Robinson v. Litton*, it is extremely difficult to ascertain what the will was, and upon what ground the case was decided.

The strongest evidence in favor of the report in *Atkyns* is the passage in the argument in *Garth v. Cotton*,¹ where before Lord Hardwicke himself it was assumed that the case was as reported in *Atkyns*; and Lord St. Leonards puts it the same way in the report which he gives of his own argument in *Wright v. Atkyns*.² But I think the true version must be that given in *Cruise*. If the devisee died before twenty-one, leaving issue, it was to go to the issue; if he attained twenty-one it was to be sold; if he died under twenty-one without issue, the fee was to be his own absolutely. Assuming this to have been the effect of the will, we can understand Lord Redesdale's observation in *Wright v. Atkyns*,³ that Lord Hardwicke seemed to regard the interest in *Robinson v. Litton* as a chattel interest, at least as to certain parts of the property; for it does not appear that the whole was to be sold.

It is not very easy to see on what principle the court could interfere against the heir, looking to the fact that the ground of the equity is that the intention of the testator ought to be observed so far as regards all that is taken under the will. And I apprehend that it is very difficult to make out any special equity against the heir as regards anything which is not taken out of him by the testator.

However, there is the decision in *Robinson v. Litton*, supported by Lord Eldon in *Stansfield v. Habergham*. But in this case, looking at the intention, I think it clear that the testator could not have meant this plaintiff to take the estate exactly in its original state, with all the timber standing upon it. It might have been easier for Mary, who came in in immediate succession after William, than for the plaintiff, to raise the question. The limitations are first to William in fee, subject to a devise over, in the event of his dying without leaving issue, to his sister Mary for life, without impeachment of waste, with remainder to the plaintiff in fee, with further executory limitations over. It is clear, therefore, that the testator meant the estate before it came to the plaintiff to be in the hands of a person who could cut ordinary timber, and who would be restrained only from committing equitable waste. Seeing this limitation, how can I possibly find on the face of this will any equity on which to interfere with any cutting of timber (not being equitable waste), at the instance of the plaintiff, whose in-

¹ P. 454.

² P. 380.

³ P. 387.

terest was expressly postponed to an estate in another person, which carried with it this very privilege of cutting ordinary timber in priority to any rights of the plaintiff.

I can discover, therefore, no symptom of the alleged intention to preserve the estate, timber and all, intact for the plaintiff, in the event of his succeeding to it, in a will which expressly confers on a person who takes in priority to the plaintiff the right of cutting timber, which it is sought to restrain in the original taker.

Consequently, there is nothing to justify me in interfering with the right to commit mere legal waste. There is much force in Lord St. Leonards' observation upon *Robinson v. Litton*,¹ that there is no instance to be found in the books in which an adult owner in fee has been restrained from cutting timber. Lord Hardwicke did certainly rely much on the improbability of timber being cut during the tenancy of an infant. But with respect to equitable waste the question is very different. Putting aside all the authorities upon malicious waste, which is not in question here, it is clear from the name and arms clause and other particulars that the testator considered himself as dealing with the capital mansion-house of the family. It would be a monstrous construction to hold, that, because the fee was given, it would be competent for the first taker to pull down the mansion-house. Then the whole question of equitable waste is so closely connected with the preservation of the mansion, that it is not going too far to say upon the construction of the whole will, that by the mansion-house and the appurtenances, the testator intended to comprise everything of an ornamental character with reference to the mansion-house. I cannot better express my view upon this part of the case than by reading a passage from the judgment of Lord Justice Turner, in *Micklethwait v. Micklethwait*:² "When the court is called upon to interfere in cases of this description it is bound, I think, in the first place to consider, whether there are any special circumstances to affect the conscience of the tenant for life, for, in the absence of such special circumstances, it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have, then, to consider what are the special circumstances which the court will regard as affecting the conscience of a tenant for life, and I apprehend that what is principally to be regarded, is the intention of the settlor or deviser. If by his disposition, or by his acts, he has indicated an intention that there should be a continuous enjoyment in succession of that which he himself has enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience, that a tenant for life claiming under his disposi-

¹ Law of Real Property, p. 380.

² 3 Jur. N. S. 1283.

tion should by the exercise of a legal power defeat that intention. We have here, I think, the clue by which the difficulty in this case may be solved. "If a devisor or settlor occupies a mansion house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house, and it cannot be presumed that he meant it to be deprived of that ornament which he himself enjoyed."

This reasoning obviously applies to every case of an estate limited so as to go in a course of succession; and the passage seems to me so pertinent that I cannot possibly use words more apt to express my view of the present case. The testator devised this estate to go in succession to different classes of owners, and the case is therefore within the principle on which the doctrine of equitable waste depends. The tenant for life, sans waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical. Then the principle of equitable interference is, that if the estate is to go in succession, equitable waste ought to be restrained; and, for this purpose, it is quite immaterial whether the succession is effected by creating life estates or estates in fee subject to executory devises. Mr. Daniel put the case thus: that the testator, by creating a tenancy in fee, indicated an intention to confer ownership in a sense different from the ownership of a mere tenant for life, and was willing to trust to the taste and proper feeling of the successive owners in fee not to use their power for the destruction of anything essential to the estate. But I apprehend that was not the testator's intention. There is not the slightest intimation to be found of an intention that any one should exercise the power of committing equitable waste.

In the abstract the criterion of taste amounts to nothing, and therefore the taste of the testator is always taken as the only possible criterion of what is ornamental timber; and if the power contended for exists, whole avenues of trees might be destroyed by a tenant, not from any desire to injure the estate or the mansion-house, but because he objected to avenues altogether.

It was said that to restrain this tenant in fee would be to place him in a worse position than a tenant in tail. But the answer is, that he is in a worse position by the nature of his estate. The tenant in tail (even if it be special tail) can suffer a recovery and make the estate his own; therefore the court will not interfere with his rights of ownership. The Duke of Marlborough's case was cited in answer to this view, as showing that the court abstained from interfering with a tenant in tail even where he had no power of barring the entail. But

I apprehend that that case went simply upon this principle, that the tenant, having all his issue in him, and therefore having an indefinite estate so far as that issue extended, his ownership could not be interfered with except by act of Parliament. The law would not allow his absolute dominion to be curtailed. For this reason a statute was passed which might tie up the estate for centuries, and it would have been a monstrous proposition to say that in consequence of that the ordinary powers over the estate were to be taken away from that time. Accordingly, it was held that the rights of the successive tenants must follow the ordinary rules, except so far as those rules were modified by this singular act of Parliament. My opinion, therefore, is shortly this. The testator created a tenancy in fee with an executory devise over, and also a tenancy for life sans waste. There is no intention intimated to give to the tenant in fee any larger rights in respect of timber than to the tenant for life. At law their rights would be the same, and there is no reason to be derived from any intention discoverable in the will why they should not be identical in equity.¹

¹ The decree of Vice-Chancellor Wood was affirmed on appeal (2 De G., F. & J. 235), Lord Campbell, C., delivering the following opinion:

THE LORD CHANCELLOR. In this case the plaintiff, by his bill, prayed an injunction "to restrain the cutting of any timber, or at any rate of any ornamental timber," growing upon the lands devised in fee to the defendant, subject to an executory devise over to the plaintiff.

The decree of the Vice-Chancellor declared, "that the defendant is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as has been planted or left standing by way of ornament or shelter with reference to the occupation of the mansion-house on the said devised estates; but that he is not entitled to fell any unripe timber or any timber planted or left standing for ornament or shelter as aforesaid."

The result of the decision is, that the defendant is punishable of legal, but not of equitable, waste. After great consideration, I agree with the Vice-Chancellor on both questions.

As to the first, my opinion is clear and decided. The defendant is tenant in fee-simple, with all the incidents of such an estate, although there be executory devises over in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee-simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber mature and fit to be cut, and not such as has been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first taker, who is made tenant in fee, should during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life and sans waste. He could not have intended that the first taker, to whom

he gave a fee, should be more restricted in the management of the property than the devisee over, to whom he gave only a life-estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him dispendable of waste.

So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for, on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been if the testator, being a prudent man, had himself survived and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter.

The *onus* seems to lie upon the plaintiff to show, by authority, that tenant in fee-simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained.

The plaintiff's counsel relied on *dicta* to be found in the reports of three cases, *Robinson v. Litton* (3 Atk. 209; Cru. Dig. tit. xvi. c. 7, § 26); *Stansfield v. Habergham* (10 Ves. 273), and *Wright v. Atkyns* (17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143). According to Vesey, Jr., a very careful and accurate reporter, Lord Eldon did say, in *Stansfield v. Habergham* (10 Ves. 273), "I should by dissolving this injunction contradict what has been understood to be the doctrine of this court; that, where there is an executory devise over, even of a legal estate, this court will not permit the timber to be cut down." But this doctrine is not to be found in any text writer, and it has never been acted upon. In *Wright v. Atkyns* (17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143), the power of the widow to cut down timber was only questioned upon the supposition that she took no more in equity than an estate for life. In *Robinson v. Litton* (3 Atk. 209; Cru. Dig. tit. xvi. c. 7, § 26), Lord Hardwicke was influenced by the consideration that the tenant in fee-simple with an executory devise over was the infant heir of the testator, and was about to cut down timber improvidently. The limitation was as stated by Cruise (6 Cruise, 428, 429); and the infant, though seized of the legal estate in *fee*, was entitled to the rents and profits only until he attained twenty-one, *i. e.*, for a chattel interest. After that he was to become trustee for his sisters; and, even according to the report in *Atkyns*, the circumstance of the infant being a trustee for the benefit of his sisters was mainly relied upon in granting the injunction (3 Atk. 209).

Therefore, as to legal waste, I think there is no authority to outweigh the considerations which, upon principle, lead strongly to the conclusion that, so far, the injunction ought to be dissolved.

Had there been a charge in the bill, supported by evidence, that the cutting down of the ornamental and immature timber was malicious, I should have entertained no doubt that this court ought to interfere by injunction. Tenant in fee-simple, subject to an executory devise over, of a mansion surrounded by timber for shelter and ornament, cannot say that the property is his own; so that out of spite to the devisee over, he may blow up the mansion with gunpowder and make a bonfire of all the timber. The famous Raby Castle Case (*Vane v. Lord Barnard*, 2 Vern. 738) shows that such things may not be done by tenant for life sans waste, and tenant in *fee* with an executory devise over, actuated by malice, would not have greater liberty to destroy.

The waste which intervenes between what is denominated legal waste and

what is denominated malicious waste, viz., equitable waste, may admit of a different consideration. But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconsciously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator, who, no doubt, wished that the property should come to the devisee over in the condition in which he, the testator, left it at his death; the first taker having had the reasonable enjoyment of it, and having managed it as a man of ordinary prudence would manage such property were it absolutely his own. In the present case, the devise being by the testator of "all his said mansion-house and estate at Brattleby and North Kelsey, with the appurtenances," there would be great difficulty in distinguishing for this purpose between the mansion-house and the ornamental timber. Indeed, Mr. Daniel contended that, in the absence of malice, this court could not interfere to protect the mansion-house. I put to him hypothetically, in the course of his able argument, the supposition that a mediæval castle is devised to A. in fee, subject to an executory devise over to B. in fee, and that A. from a sincere dislike of turrets and moats, and a genuine love of roses and lilies and gravel walks, and believing that B. and all other sensible men must have the same taste, declares that he means to throw down all the buildings and to convert the site of the castle into a flower-garden, and begins with setting men to strip the lead from the roof of the donjon tower. A bill being filed by B. for an injunction, would this court interfere? Mr. Daniel answered: "A., acting *bond fide*—No." Nevertheless I cannot help thinking that in spite of A.'s *bond fides*, what A. contemplated would be in the nature of a destruction of the subject devised, and would certainly be in contravention of the intention of the devisor, so that B. would be entitled to an injunction. It may be said that this is an extreme case, but it is by an extreme case that the soundness of a principle is to be tested. The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a Court of Equity by injunction can well be drawn other than the recognized and well-established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable.

I am willing, with Vice-Chancellor Page Wood, to accept the clew by which Lord Justice Turner, in *Micklethwait v. Micklethwait* (1 De G. & J. 504, 524), proposed to solve the difficulty: "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." However, I cannot go so far as the Vice-Chancellor, who is reported to have added: "This reasoning obviously applies to every case of an estate limited so as to go in a course of succession." "The tenant for life, sans waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical" (*Turner v. Wright*. John. 740-751).

Where an estate tail is created with successive estates tail in remainder, the estate entailed is "limited to go in a course of succession," but a tenant in tail is disipnisable of equitable as well as legal waste, because he may at any time bar the entail, and give himself a pure and absolute fee-simple. Again, a tenant for life sans waste can hardly be said to be as much owner of the timber as the tenant in fee; for although the tenant for life (avoiding equitable waste) may fell and dispose of the timber in his lifetime, were he to sell growing trees they would go to the remainder-man or reversioner, if not severed from the soil in his lifetime; whereas the tenant in fee might by sale or conveyance give the purchaser an absolute and permanent interest in the trees against all the world. Nevertheless I think that the rights and liabilities of tenant for life sans waste may be taken as a measure of the rights and liabilities of devisee in fee, subject to an executory devise over.

The only analogy at all unfavorable to this view of the case is that of tenant in tail, with the reversion in the Crown, and tenant in tail under an act of Parliament which precludes the barring of the entail. Such tenants in tail are considered disipnisable of waste; this being an incident of tenancy in tail, probably arising from the power which generally subsists of barring the entail, and it not having been thought fit to make an exception in respect of those rare cases in which the power of barring the entail is withheld. But in the Marlborough Case (3 Madd. 498), although the court would not interfere on the mere ground that the tenant in tail was prohibited by statute from barring the entail; yet, having regard to the enactment "that Blenheim House should in all times descend and be enjoyed with the honors and dignities of the family," it was held that the court ought to interfere not only to prevent the destruction of the house, but also to protect the timber essential to the shelter and ornament of the house (3 Madd. 549).

There is an analogy which entirely accords with the distinction made by the Vice-Chancellor in this decree between legal and equitable waste, viz., the case of "tenant in tail after possibility of issue extinct," who is disipnisable of legal waste in respect of the estate of inheritance which was once in him, but may be restrained by injunction from committing equitable waste, this being an abuse of his legal power.

For these reasons I think that the decree of the Vice-Chancellor, as he pronounced it, should in all respects be affirmed, and that the appeal must be dismissed with costs.

USBORNE *v.* USBORNE.

MARCH 7, 1740.

[*Reported in Dickens 75.*]

THE order of this date states that the plaintiff, under an assignment, was entitled to a mortgage term of five hundred years of two farms and premises, for securing £630 and interest from the defendant Usborne, subject to redemption; that Usborne had sold the timber standing and growing on the mortgaged premises to the defendant Bathurst; that he had entered on the mortgaged premises,

and cut down several trees, and threatened to cut down more, by means whereof the mortgage security would be lessened. It was therefore ordered that an injunction should be awarded to stay the defendants, etc., from committing any waste or spoil on the premises, etc., until answer and further order.

NOTE.—A similar order in *Hopkins v. Monk*, A.D. 1742, and in *Uvedale v. Uvedale*, March 7, 1740; and by Lord Thurlow, C., in *Gross v. Chilton*, April 25, 1782, after a doubt and consideration, thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession.

PERROT *v.* PERROT.

IN CHANCERY, BEFORE LORD HARDWICKE, C., JUNE 30, 1744.

[*Reported in 3 Atkyns 94.*]

THERE was a limitation in a settlement to the defendant for life, to trustees to preserve contingent remainders, to his first and every other son in tail, remainder to plaintiff for life,¹ with remainder to his first and every son in tail, reversion in fee to the defendant.

The first tenant for life² cuts down timber, the plaintiff, who is the second tenant for life, brings his bill for an injunction to stay waste.

Mr. Attorney-General for the plaintiff showed cause why the injunction for restraining the defendant from committing any further waste should not be dissolved.

It was insisted by Mr. Solicitor-General, for the defendant, that the timber which he has cut down, are decayed trees, and will be the worse for standing, and that it is of service to the public, that they should be cut down; and that it is very notorious that timber, especially oak, when it is come to perfection, decays much faster in the next twenty years, than it improves in goodness the twenty years immediately preceding.

That as the defendant has exercised this power in such a restrained manner, and confined himself merely to decayed timber, which grows worse every day, that this court will not interpose, especially as the plaintiff is not entitled to come into this court, as he has not the immediate remainder, and besides, has no remedy at law.

LORD CHANCELLOR. The question here does not concern the interest of the public, unless it had been in the case of the King's forests and chases; for this is merely a private interest between the parties; and it is by accident that no action at law can be maintained

¹ Remainder to trustees to preserve contingent remainders.

² Before he had any son born.

against the defendant, because no person can bring it, but who has the immediate remainder.

Consider, too, in how many cases this court has interposed to prevent waste.

Suppose here the trustees to preserve contingent remainders had brought a bill against the defendant to stay waste for the benefit of the contingent remainders.¹

I am of opinion they might have supported it, but here it is the second tenant for life,² who has done it, and though he has no right to the timber, yet if the defendant, the first tenant for life, should die without sons, the plaintiff will have an interest in the mast and shade of the timber.

The case of Welbeck Park, which has been mentioned, was a very particular one, because there, by the accident of a tempest, the timber was thrown down, and was merely the act of God.

But this is not the present case, for here a bare tenant for life takes upon him to cut down timber, and it is not pretended that they are pollards only: and though the defendant's counsel have attempted to make a distinction between cutting down young timber trees that are not come to their full growth, and *decayed* timber, I know of no such distinction, either in law or equity.

Therefore, upon the authority of those cases which have been very numerous in this court, of interposing to stay waste in the tenant for life, where no action can be maintained against him at law, as the plaintiff has not the immediate remainder, the injunction must be continued till the hearing.³

WENTWORTH *v.* TURNER.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., Nov. 19, 1795.

[*Reported in 3 Vesey, Jr. 3.*]

TENANT for life made a lease of coal-mines to the defendant.

Mr. King, on the part of the tenant for life and the remainder-man in fee, who joined in the bill, moved for an injunction to restrain the defendant from taking coal; alleging, that the lease was made by mistake, and was a forfeiture of the estate for life.

LORD CHANCELLOR. I cannot help that. I cannot hear a man

¹ *Vide Whitfield v. Bewit*, 2 Cox's P. W. 240, note 1; *Garth v. Cotton*, [3 Atk.] 751; *Williams v. Duke of Bolton*, 3 Cox's P. W. 368, note 1.

² *Vide Roswell's Case*, 1 Roll's Ab. 377, pl. 13; 3 P. W. 268, note F.

³ Reg. Lib. B. 1743, fol. 432.

coming to disaffirm his own lease. If tenant for life liable to waste had sold timber, he could not prevent the vendee from cutting it. It is collusion to bring forward the remainder-man. If he complains, he must file a bill alone.

FARRANT *v.* LOVEL.

IN CHANCERY, BEFORE LORD HARDWICKE, C., FEBRUARY 12, 1750.

[*Reported in 3 Atkyns 723.*]

A BILL was brought by a ground landlord to stay waste in an under-lessee, who held by lease from the original lessee.

LORD CHANCELLOR. A certificate being produced of the waste, I am of opinion the plaintiff has the same equity as in other cases of injunctions.

As where there is tenant for life, remainder for life, remainder in fee, yet the court, on a bill brought by remainder-man in fee, to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste, grant an injunction.

So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction.

So, likewise, where there is only a mortgage for a term of years, and the mortgagor commits waste, the court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance.

For these reasons his Lordship granted an injunction to stay waste.

KANE *v.* VANDERBURGH AND OTHERS.

IN THE COURT OF CHANCERY, APRIL 26, 1814.

[*Reported in 1 Johnson, Chancery, 11.*]

THE bill, which was for an injunction to stay waste, stated, that Abraham Tenbroeck, being seized in fee of the premises, devised them in fee to his daughter, Margaret, who devised them to her sister, Elizabeth Schuyler, for life, remainder to her children living at her death, and in default of such children, remainder to the children of her brother, Dirck Tenbroeck, in fee. After the death of the two

testators, Elizabeth Schuyler, and her husband, released her interest to the plaintiff. Elizabeth is still living, but without issue; and the defendants are tenants from year to year. The bill further stated that actions of ejectment were intended to be brought against the defendants, who had been served with notices to quit, which would expire on the 1st May next; and it charged, also, "that the defendants, by themselves, and others, hired by them, are daily committing great waste on the premises, by cutting down large quantities of valuable wood and timber, for sale, and carrying the same to market, to the great and irreparable injury of the land, and of the estate of the plaintiff."

No answer had yet been put in to the bill.

Woodworth, for the defendants, now moved to dissolve the injunction for want of sufficient matter stated in the bill.

Henry, contra.

The CHANCELLOR. The waste is explicitly and sufficiently charged in the bill to support the injunction. Nor is it essential to this remedy that there should be an actual *litis pendens* in a court of law. There are numerous cases in chancery, as Lord Hardwicke has frequently observed,¹ in which the court has interposed to stay waste, by the tenant, where no action can be maintained against him at law. Thus, where there is lessee for life, remainder for life, remainder in fee; the mesne remainder-man cannot bring waste, nor the remainder-man in fee, but chancery will interpose and stay the waste.

So equity will, in many cases, restrain waste, though the lease contain the clause *without impeachment of waste*, and which takes away the remedy at law, as where this power is exercised in an unreasonable manner, and against conscience.²

Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court.

The tenant for life is here suffering injury to his own interest, and he, by his tenants, is doing great injury to the inheritance, which it is his duty to prevent. He is bound to stop the mischief, or be responsible himself. To suppose that an ejectment must be actually commenced before the injunction can issue, is certainly an error; this would be placing the operation of waste beyond the reach of control during the period of the six months' notice. Indeed, the notice to quit may be considered as the commencement of an adverse proceed-

¹ *Perrot v. Perrot*, 3 Atk. 94; *Robinson v. Liffen*, 3 Atk. 210; *Farrant v. Level*, 3 Atk. 723; *Garth v. Cotton*, 1 Ves. 556.

² *Aston v. Aston*, 1 Ves. 264; *Strathmere v. Bowes*, 2 Bro. 88.

ing at law, and sufficient to bring the case within the spirit of the decision in *Lathrop v. Marsh.*¹

Motion denied, with costs.

WHITFIELD v. BEWIT.

IN CHANCERY, BEFORE LORD MACCLESFIELD, C., JANUARY 24, 1724.

[Reported in 2 *Peere Williams* 240.]

ONE seized in fee of lands in which there were mines, all of them unopened, by deed conveyed those lands and all mines, waters, trees, etc., to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A. for life, remainder to his first, etc., son in tail male successively, remainder to B. for life, remainder to his first, etc., son in tail male successively, remainder to his two sisters C. and D., and the heirs of their bodies, remainder to the grantor in fee.

A. and B. had no sons, and C., one of the sisters, died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A. having cut down timber sold it, and threatened to open the mines; the heir of the grantor being seized of one moiety *ut supra* by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber and to stay A.'s opening of any mine.

1st Obj. As to the plaintiff's claim of the moiety of the moneys arising by sale of the timber, in regard the plaintiff comes into equity for the same, it would be more agreeable to the rules of equity, that the moneys produced by the timber should be brought into court and put out for the benefit of the sons as yet unborn, and which may be born. That these contingent remainders being in *gremio legis* and under the protection of the law, it would be most reasonable that the moneys should be secured for the use of the sons when there should be any born; but as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff; and the case would be the same if there were a son *in ventre sa mere*: or the plaintiff might bring trover, and then what reason had he to come into equity?

Cur. : The right to this timber belongs to those who at the time of its being severed from the freehold were seized of the first estate of inheritance, and the property becomes vested in them.

As to the objection, that trover will lie at law, it may be very

¹ 5 Ves. 259.

necessary for the party who has the inheritance to bring his bill in this court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by the tenant for life. This was the very case of the Duke of Newcastle *v.* Mr. Vane, where at Welbeck (the duke's seat in Nottinghamshire) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainder-man in tail.

Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shows *quo animo* it was done, not to repair but to sell.

2dly. It was urged, that the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A. for life, and like Saundar's Case in 5 Co. 12, where it is resolved, that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the *cestui que use* for life might open them.

But LORD CHANCELLOR, *contra*: A. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water, was, that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor King, on a rehearing.

LORD CASTLEMAIN *v.* LORD CRAVEN.

IN CHANCERY, BEFORE HONORABLE JOHN VERNEY, M. R.,
MICHAELMAS VACATION, 1733.

[Reported in 22 *Viner's Abridgment* 523, placitum II.]

A., TENANT for life, remainder to trustees to preserve, etc., remainder to C. the plaintiff in tail, remainder over, with power for A. with consent of trustees to fell timber, and the money arising to be invested in lands, etc., to same uses, etc. A. felled timber to the value of £3,000 without consent of trustees, who never intermeddled, and A. had suffered some of the houses to go out of repair. C. by bill

prayed an account and injunction. The Master of the Rolls said, that the timber may be considered under two denominations, (to wit) such as was thriving, and not fit to be felled; and such as was unthriving, and what a prudent man and a good husband would fell, etc. And ordered the master to take an account, etc., and the value of the former which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, etc. But as to repairs, the court never interposes in case of permissive waste either to prohibit or give satisfaction, as it does in case of wilful waste; and where the court having jurisdiction of the principal, (viz.) the prohibiting, it does in consequence give relief for waste done, either by way of account as for timber felled, or by obliging the party to rebuild, etc., as in case of houses, etc., and mentioned Lord Barnard's Case, as to Raby Castle.¹ But as to the repairs it was objected, that the plaintiff here had no remedy at law, by reason of the estate for life to the trustees mean between plaintiff's remainder in tail and defendant's estate for life, and that therefore equity ought to interpose, etc., and that this was a point of consequence. *Sed non allocatur.*

PACKINGTON'S CASE.

IN CHANCERY, BEFORE LORD HARDWICKE, C., MAY 9, 1744.

[*Reported in 3 Atkyns 215.*]

SIR HERBERT PACKINGTON, tenant for life, without impeachment of waste, of an estate at Westwood, in Worcestershire, being out of the kingdom,² his agent was made defendant to a bill brought to stay waste by Mr. Packington, son of Sir Herbert, and first tenant in tail, and has put in an answer.

The motion now was, for an injunction to stay Sir Herbert Packington's agent from cutting down trees in the park at Westwood, which are either an ornament, or shelter to the mansion-house.

LORD CHANCELLOR. It might be for the interest of private families if the common law had not given so large a power to tenant for

¹ 2 Vern.

² The plaintiff alleged, that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatend to cut down and destroy them all; that Sir H. Packington's agent had agreed for the sale of 2,000 trees, and that in consequence thereof some trees had been actually felled. Note, it does not appear from the allegations of the plaintiff in the present motion, whether the agent had admitted this fact by his answer. Sir H. Packington's answer was not come in. Reg. Lib. B. 1744, fol. 325.

life, without impeachment of waste,¹ equal to a tenant in fee; but the common law thought it for the interest of the public, as timber might thereby circulate for shipping and other uses.

But this court has restrained their power greatly, in comparison of what it was formerly.

The first case came before Lord Cowper, of Vane *v.* Lord Bernard,² where the defendant was restrained from pulling down Raby Castle.

The court has gone farther, and has restrained such tenant for life from cutting down timber, either for ornament or shelter of the house; and farther still in the case of Charlton *v.* Charlton, in extending it to the case of a park.

There was, indeed, a difference of opinion between Lord Chancellor King, and the Master of the Rolls, but only in part, for Lord King continued the injunction as to trees for ornament, or shelter, but dissolved it as to straggling trees.

It is very proper for the court to preserve trees that are a shelter to the mansion-house.

In the present case, only three oaks³ have been cut down, and if there was no intention to commit further waste, it would be material, but this appears to be but the beginning of waste; for Sir Herbert Packington's letter has been read in 1741,⁴ whilst he was abroad, in which he says, if his son will not join with him in cutting off the entail, he will give orders for cutting down all the ornamental timber trees.

The question is, whether these are grounds for an injunction to stay waste?

The first objection is, that these trees grow in a wood, and have arisen naturally, and by accident, and not from planting.

But I do not think this will hold, because, whether trees grow natural, or were planted, if they serve as an ornament, or shelter, it amounts to the same thing; and it is very probable the situation of the house was chosen for the sake of cutting ridings and vistas through the woods; and I can mention two of this kind of my own acquaintance, Hampstead, a seat of Lord Craven's, and another in Essex.

I will restrain the defendant, therefore, from cutting down trees in lines, or avenues, or ridings in the park; and likewise from cutting down trees that are not of a proper growth to be cut.

Upon a suggestion that this might create disputes, as to what were

¹ *Vide* Pyne *v.* Dor, 1 Durn. & East 55.

² 2 Vern. 738.

³ *Sed vide* note *supra*.

⁴ The purport of this letter does not appear in the Register's book in the place above cited.

of proper growth, and that very little young timber grows in this park, his Lordship left out the last part of the order, and as to the other, granted the injunction.¹

PEIRS *v.* PEIRS.

IN CHANCERY, BEFORE LORD HARDWICKE, C., JULY 23, 1750.

[Reported in 1 Vesey 521.]

THE plaintiff brought an original bill² against his father, tenant for life without impeachment of waste; to have £1,000 raised and settled according to agreement; and also a supplemental bill for waste committed at a house in Wells by the father's pulling up a deal floor, and removing it to his house at Bradley (which was said to be like pulling down a mansion-house, as the case of Raby Castle), his removing some young oaks, turning meadow into plough-land; and the contrary.

LORD CHANCELLOR. It is very unfortunate, such an expense should be created between a father and son. The clause, *without impeachment of waste*, is generally put in to prevent disputes of this kind; but if it was so to be made use of, that a son should have it in his power to call a father into a court of equity for every alteration he makes in a walk or an avenue, though he removes the trees to another part, and so of the house, it would be such a fund for disputes between a father and son, there would be no end of it; and it would be better for the public, that Raby Castle had been pulled down, than that precedent had been made. It is not an immaterial circumstance for the defendant, that an injunction was never applied for, which is always done on such a bill as this; which must be maintained on the head of destruction and spoliation. Beside this floor was placed, and the trees planted, by the father himself: therefore if no more in the case, I would dismiss the supplemental bill with costs to be taxed. But on the original bill the plaintiff has an equity to have the £1,000

¹ His Lordship granted the injunction "to restrain Sir H. Packington, his agents, servants, and workmen from cutting down timber trees growing in Westwood Park aforesaid, which were for the shelter or ornament of the said mansion-house there; and also any timber trees, which were planted or grew in any lines, avenues, or ridings, for the ornament of the said park, until the said Sir H. Packington shall fully answer the plaintiff's bill" Reg. Lib. B. 1744, fol. 325; *Vide Aston v. Aston*, 1 Ves. 264; *Piers v. Piers*, ibid. 521; *Chamberlyne v. Dummer*, 1 Bro. Cha. Rep. 166; 3 Bro. Cha. Rep. 549, S. C.; *Strathmore v. Bowes*, 2 Bro. Cha. Rep. 88.

² 1 Brown 159.

raised and settled.¹ If a father, tenant for life, wants to raise a sum, and gets his son to join for the security, but the father receives the money, it is the debt of the father, who will be bound to exonerate the son's estate from this incumbrance; for the son will be considered as having pledged his estate for that purpose: just as if wife joins with husband in raising money on her estate, it will be considered as pledging her estate for that, and the husband is bound to exonerate it.

SMYTHE v. SMYTHE.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 31, APRIL 1,
AND MAY 28, 1818.

[Reported in 1 *Swanstⁿon* 252; 2 *Swanstⁿon* 251.]

THE bill filed on the 9th of February stated, that the defendant was tenant for life of certain estates, subject to impeachment of waste, during a term of 30 years; and after that period, without impeachment of waste; that the term having expired in January last, the defendant marked and advertised for sale all the oak, ash, and elm trees (with few exceptions) on the estates; and charging that the trees afforded shelter and ornament, and were necessary to the pleasurable enjoyment of the estate, and were for that purpose planted and suffered to grow, prayed an injunction against felling any timber or trees, growing or planted for the ornament of the mansion-house, or for ornament in the grounds and plantations, or saplings unfit to be cut.

The answer having been filed on the 26th of February, insisting on a right to cut timber, but denying the fact or intention of cutting ornamental trees, the plaintiff on this day moved for an injunction to restrain the defendant from cutting any timber or other trees unfit to be cut in a due and fair course of husbandry.

The *Solicitor-General* and *Mr. Rose* for the motion.

Sir Samuel Romilly, *Mr. Bell*, and *Mr. Dowdeswell* for the defendant.

The plaintiff having in support of the motion offered affidavits subsequent to the answer, tending to prove the fact of equitable waste, the defendant objected to their being read; insisting that although an injunction obtained on affidavits filed before the answer may be sus-

¹ Son having a remainder in fee, joins his father, tenant for life, in a mortgage to raise money for the use of the father, the mortgage not being paid off till after the father's bankruptcy, the son cannot prove his interest under the commission. 1 *Brown* 384.

tained on affidavits filed subsequently, an injunction cannot be originally granted on such affidavits.

The LORD CHANCELLOR. I recollect no former case in which this question has arisen. The allegations in the bill are general: if the plaintiff at once supports them by the statement of particular facts on affidavit, the defendant possesses an opportunity of explaining or denying those facts in his answer; but if the plaintiff reserves his affidavits till the answer is filed, he deals not altogether fairly with the defendant, who is entitled before the answer to be apprised of the points on which the plaintiff rests his case. I shall pause before I extend to cases, in which no previous injunction has been obtained, the rule of practice which authorizes the admission of affidavits for continuing an injunction to stay waste against the answer. Affidavits of acts of waste committed since the filing of the bill are entitled to a distinct consideration.

April 1.—The LORD CHANCELLOR. On diligent inquiry I find no instance in which the court has permitted the plaintiff to support a motion for an injunction, by affidavits filed after the answer. The Countess of Strathmore *v.* Bowes is the most material case; but all the reasons there given for receiving the affidavits tendered are founded on the fact that the injunction had been originally granted on affidavit. The affidavits are inadmissible.

Motion refused.

May 28, 1818.

THE supplemental bill in this cause, filed on the 15th of April, 1818, stated, that since the defendant put in his answer to the original bill, he had marked for cutting a large quantity of timberlike trees, unfit to be cut as timber, or in a due course of cutting; and prayed, that the defendant might be restrained from felling or cutting any timber or other trees on the estates in question, unfit to be cut or felled in a due course of cutting or felling, or not come to maturity and fit to be cut as timber.

The answer of the defendant denied that he had marked any trees which were unfit to be cut as timber, or in due course of cutting.

On this day, the plaintiff moved for an injunction to restrain the defendant from cutting any timber or other trees or saplings standing on the lands mentioned in the pleadings, that are unfit to be cut or felled in a due and fair course of husbandry.

The affidavits in support of the motion (filed before the answer to the supplemental bill) stated, that the defendant had marked for cutting every tree, however young, that could be sold; that if some of

the oak trees marked should be cut, great waste would be committed, and irreparable loss ensue, and the saplings left would perish. According to the affidavits in reply, a very small proportion of the oak trees marked to be felled measured less than nine cubical feet, and no injury would ensue to the saplings or trees left, by felling those marked.

The *Solicitor-General*, and *Mr. Rose*, in support of the motion, cited the *Marquess of Downshire v. Lady Sandys*,¹ and *Lord Tamworth v. Lord Ferrers*.²

Sir Samuel Romilly, *Mr. Bell*, and *Mr. Dowdeswell*, against the motion.

The LORD CHANCELLOR. A tenant for life, without impeachment of waste, is clearly not compellable to cut timber, in such way, as a tenant in fee would think most advantageous, but is entitled to cut down anything that is timber. This motion requires an affidavit, pledging the deponent, that the trees about to be cut are not fit for timber. It is settled, that a tree, which a tenant in fee, acting in a husband-like manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life, unimpeachable of waste, might cut down all these trees, without question, at law; and to subject him, in this court, to the rules which a tenant in fee might observe, for the purpose of husband-like cultivation, would deprive him of almost all his legal rights. If the trees are so far advanced as to become timber, the tenant may cut them down, though they are in a state to thrive, and though cutting them down would injure the saplings. It is not sufficient to state, that this is thriving wood; it must be thriving wood not fit for the purposes of timber. I cannot determine whether a tree, measuring less than nine cubic feet, is, or is not, fit for purposes of timber. If the plaintiff files an affidavit, stating, that trees measuring less than nine cubic feet are not fit for purposes of timber, that must be met. In the cases referred to, the injunction restrained the tenant for life from cutting trees unfit to be cut *as timber*.

Injunction refused.

¹ 6 Ves. 107.

² 6 Ves. 419.

BARRY *v.* BARRY.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 6, 7,
AUGUST 11, 1820.

[Reported in *1 Jacob & Walker* 651.]

By the will of R. Heale, certain estates were devised to the defendant for life, without impeachment of waste; with remainder to his first and other sons in tail male, with other remainders over: the plaintiff, who was the eldest son of the defendant, having attained twenty-one, joined with his father in suffering a recovery and resettled the estates to the use of the defendant for life, subject to impeachment of waste; with remainder to the plaintiff in fee, charged with an annuity to the second wife of the defendant, and a portion to be raised for a younger child.

The bill was filed on the 1st of March, 1819, for an account and an injunction to stay waste; the answer was put in in November in the same year; soon after affidavits were filed by the plaintiff, stating several acts of waste committed by the defendant; and a notice of motion for an injunction was given for the 24th January, 1820; other affidavits in answer were filed by the defendant, and the motion now came on. On the question of receiving the affidavits filed by the plaintiff subsequently to the answer, the case of *Smythe v. Smythe*¹ was mentioned, which the Lord Chancellor said he thought was quite right; it was argued by the plaintiff's counsel, that though strictly the affidavits could not be received on a motion after answer, yet the defendant had, by answering them, waived the irregularity;² it was not, however, necessary to decide this, as the objection was not taken till after the affidavits had been read.

The acts of waste appearing from the answer and affidavits, were of very small extent, and most of them had been committed some years before the commencement of the suit. The most considerable were the cutting down a few elms of trifling value, and taking down part of a garden wall, which the defendant represented to have been done with a view to improvement.

Mr. G. Wilson and *Mr. Roupell* in support of the motion.

Mr. Heald and *Mr. Matthews* against it.

The LORD CHANCELLOR. This is undoubtedly a very singular case; the bill is filed by a gentleman, who is the remainder-man, subject to the life interest of his father, who was originally unimpeachable of waste, but who has by a settlement reduced himself to be im-

¹ *1 Swan.* 252.

² *Ex parte Bury*, 1 *Buck.* 393; *Ex parte Smith*, *Ib.* 395.

peachable of waste. The court will look upon a father and son in the same way as it would upon strangers, considering at the same time that there are many acts much more proper to be overlooked by a son than by a stranger.

The son in 1819 files this bill for an injunction to stay waste; he does not move upon the filing of the bill, but delays it till now in March, 1820; and it is admitted, that since he filed the bill, which I consider as a notice to his father, that he thought he had some reason to complain, the father has not done anything upon the estate that he was not entitled to do.

I do not say to what extent a son should act against his father, in respect of what he conceives to be his rights; he must judge for himself; and the court must sustain the interests that the law gives him. It certainly appears that many of the acts now complained of are such as the father could not justify; for he cannot excuse himself by saying, that though he has been guilty of waste, yet it was such waste as is productive of beauty and improvement.

I admit also, that a small degree of waste (I do not say the smallest), manifesting an intent to do more, will be sufficient for the court to act upon; but it will look at it in the manner in which the subject is viewed by the courts of law, and there the extent of the waste done is considered very material. There is an authority at law, where a verdict having been found for the plaintiff, judgment was entered up for the defendant, on account of the extreme smallness of the damages.¹ A court of equity will, in this, follow the law. I recollect one case, where the subject of complaint consisted of some acts that were not waste, together with others that certainly were, namely, the pulling up a few young oak-plants; they were so small, that they were brought into court, annexed to the affidavits, and there the injunction was refused.

The ground I go on is, that, between a father and son, many things might probably be permitted that would not have been permitted to a stranger: if this had been a stranger, filing a bill and thus delaying his motion, I should say, it is the business of the reversioner to come here promptly; and in this case, when the plaintiff has permitted his father to go on for five or six years, and suffered him to commit waste, under the notion that he was making improvements; and when it is admitted, that upon the filing of the bill, he desisted, though I am ready to say, that if another tree be cut down, if any act of waste be done in future, the plaintiff shall have an injunction, and though I do not mean to sanction the acts that have been done, yet, under the form in which this application is made, I cannot grant it.

¹ Harrow School *v.* Alderton, 2 Bos. & Pull. 86.

August 11th.—The motion for an injunction was renewed upon affidavits stating that the defendant had in April last cut down two young ash trees, and lopped several elms. It was met by affidavits on the other side, from which it appeared that what had been done was necessary, in order to admit the growth of the contiguous trees; the timber produced was of very small value, and had been applied to repairs of the fences on the estate.

Mr. G. Wilson for the motion.

Mr. Matthews against it.

The LORD CHANCELLOR. The view I took of the case on the former occasion was, that acts had been committed which, if they had been recent, might have formed a ground for granting an injunction; the question now is, whether since that time the defendant has abstained from doing acts that would induce the court to interpose. Now the plaintiff, in order to succeed, must satisfy the court, that the property is put into some hazard; and looking at what has been done here, does it amount to that?

We know that at law, in an action for waste, where there has been a verdict for the plaintiff, but the damage done is very small, the court is authorized to enter up judgment for the defendant; and surely this court will not interpose where no damages could have been recovered at law. Now here it is sworn, that the trees were cut down to preserve the others, and that the value of them was only a few shillings. As to the elm trees, it seems that six or eight have been lopped; but it is sworn by four or five affidavits in contradiction to one, that they stood on so small a piece of ground that it was necessary to take off some of the branches, that the other trees might grow; the value of the cuttings is £1 4s. and they have been employed on the fences.

Then taking it to be so, is this a case for an injunction? But I repeat again, that if any recent acts were done, showing that the party intended to commit spoil and waste, the court would give an effectual prohibition.

Motion refused.

COFFIN *v.* COFFIN.

IN CHANCERY, BEFORE LORD ELDON, C., APRIL 14, 1821.

[Reported in *Jacob* 70.]

THE defendant, J. P. Coffin, was tenant for life, without impeachment of waste, of a mansion-house and estate, situate on the coast of Devonshire. The plaintiffs were R. P. Coffin the elder, who was tenant for life in remainder, and his son R. P. Coffin the younger, who was tenant in tail male in remainder, expectant on the death of R. P. Coffin the elder. The defendant J. P. Coffin had assigned his life interest to one Rowe (who was also a defendant) in trust for his creditors, and Rowe was about to fell timber. He had given the plaintiffs a notice to that effect; and, as was stated, had pointed out some ornamental timber around the house, as part of what was intended to be cut. The bill stating these facts, prayed an injunction; and on the 6th of December, 1820, an injunction was obtained upon motion *ex parte* before the Vice-Chancellor, restraining the defendants from any waste, spoil, or destruction, in or about the mansion-house; and from cutting down any timber or other trees growing upon the estate, which were planted or left growing there for the protection or shelter of the mansion-house, or which grew in lines, avenues, walks, vistas, or otherwise, for the shelter or ornament of the said house, or of the gardens, orchards, or pleasure-grounds thereunto belonging, or which in any manner protected the same from the effects of the sea; and also from cutting down any timber or other trees, except at seasonable times and in a husband-like manner, and likewise from cutting saplings and young trees, not fit to be cut for the purposes of timber.¹

Affidavits were filed on the part of the defendants, denying any intention of felling the ornamental timber; other affidavits were filed on the part of the plaintiffs, for the purpose of showing what part of the timber was of that description; and the defendants now moved to dissolve the injunction. A similar motion had previously been made before the Vice-Chancellor.²

Mr. Trower and Mr. Raithby for the defendants.

Mr. Horne and Mr. Parker for the plaintiffs.

THE LORD CHANCELLOR. The court does not protect timber, because it is ornamental, but it protects it if it was planted for ornament, whether it is or is not ornamental. And, therefore, most of the affidavits which have been filed do not apply, showing only that these trees are ornamental; it must be shown that they were planted

¹ Reg. Lib. A. 1820, fol. 115.

² 6 Mad. 17.

or left standing for the purpose of ornament. I see that in a case before Lord Hardwicke, of which I have a note, he confined it in that manner,¹ and he even carried it so far, as to restrain a man from cutting down trees that he had planted himself.

The court grants injunctions against waste, when it is done only in a slight degree, or when threatened. The injunction here went too far: nothing was done by the defendants but sending the notice; which, if Rowe really pointed out the ornamental timber, admits the construction put upon it, of an intention to cut it down. But supposing that to be made out, was it right to grant an injunction as to the other kinds of waste? It may be said, that if he commits one act of waste, he may be suspected of being about to commit others. But we ought to be careful about this, for with respect to growing timber, the court does not expect a tenant for life to let it grow so long as a tenant in fee might find it his interest to do. And the court never grants injunctions on the principle that they will do no harm to the defendant, if he does not intend to commit the act in question: but if there be no ground for the injunction, it will not support it.²

In one respect, the injunction certainly goes too far. I mean in what it says about protecting the premises from the effects of the sea. I cannot understand how that came to be inserted.

The parties afterwards, at the suggestion of his Lordship, agreed upon a reference to determine what part of the timber was fit to be cut.

¹ One of the first cases in which the principle of equitable waste was applied to timber was *Lawley v. Lawley*, in 1717. The injunction was in terms similar to those used in *Packington's Case* (3 Atk. 215), restraining the defendants from cutting down or felling any trees on the premises, that were for the ornament or shelter of the said capital messuage (Reg. Lib. B. 1717, fol. 41.) A commission afterwards went, by consent, to determine which of the trees were proper to be cut down, and which to be preserved for the ornament or shelter of the house. (Reg. Lib. B. 1717, fol. 178.) On its return, the injunction was continued during the defendant's life, as to the trees certified not to be fit for cutting. (Reg. Lib. B. 1717, fol. 386.)

² In *Coffin v. Coffin* (6 Maddock 17), it was objected that as there was no complaint in the bill as to saplings or immature trees, the injunction was too extensive. The Vice-Chancellor (Sir John Leach) is reported as saying "that as to waste at law, if any act of waste be established, the court restrains not only the particular act, but all waste generally. So in the case of equitable waste, if the complaint be established as to one act, the court will restrain all equitable waste generally, and it will make no difference that other acts of equitable waste were particularly restrained."—ED.

WOMBWELL *v.* BELASYSE.

IN CHANCERY, BEFORE LORD ELDON, C., APRIL 22, 23, 1825.

[*Reported in 6 Vesey (2d edition), 110 a, note.*]

THE LORD CHANCELLOR. The doctrine of the court is extremely well settled. If the object in planting timber, or in leaving timber standing, is ornament, whether that object is effected, whether the effect is truly ornamental, or the most absurd exhibition that ever was produced, this court will protect that timber; and the protection is not confined to trees planted, or left standing, as ornamental to a house or park: nor does it depend on the distance from the mansion; but I do not recollect that it has gone to this extent, that, if a ride is made through a wood, in which wood the proprietor has been in the habit of cutting timber for the use and repair of the mansion, that ride shall protect the whole wood from being cut at the time of making the ride, and in all future times: as, if the purposes of that ride can be as well consulted by leaving a tenth part of the wood standing, it would be most absurd to require that the whole should be left. Neither do I recollect any issue ever directed upon this; and in directing an issue attention must be had to the interests of all parties; that, if the injunction restrains the legal right to cut timber, security shall be given, that in case of the death of him, whose enjoyment of that legal right may have been restrained improperly, his estate shall, to the extent of the benefit he would have derived from the exercise of that right, be reimbursed by those who restrained him. I think, also, that two issues would be necessary; not only whether the timber was planted, or left standing, for ornament, but also, how far, consistently with that object, trees might be cut; as I cannot hold that the effect of making a ride through a wood is to be, that an axe shall not be laid to the root of a tree in that wood; which would be carrying this doctrine to an extent to which it has never yet gone.

In framing the issue another thing also must be attended to; by whom the trees were planted or left standing for ornament: as, if they had been planted by tenant for life without impeachment of waste, unless afterwards left standing with that view by some person having the inheritance, they would not be entitled to this protection.

APRIL 23.

The LORD CHANCELLOR. This is an application to discharge an order of the Vice-Chancellor, directing an issue to try whether certain trees in a wood, called Prestwood, part of the Newburgh estate,

were planted or left standing for ornament to the mansion-house, park, grounds, etc., an order formed upon the equitable doctrine of this court, with reference to waste. I do not apprehend that there are any particular circumstances requiring attention; but the question turns simply upon this; whether Lady Charlotte Belasyse, being now tenant for life without impeachment of waste, can, consistently with that equitable doctrine, exercise the legal right she unquestionably has. First, I may state, as established doctrine, that the question is not, whether the timber is, or is not, ornamental: but the fact to be determined is that it was planted for ornament; or, if not originally planted for ornament, was, as we express it, left standing for ornament by some person having the absolute power of disposition. If such a proprietor had even the bad taste to plant or leave standing, a couple of yew trees cut in the shape of peacocks on the road side, I do not shrink from what I laid down in *The Marquis of Downshire v. Lady Sandys*, that they must be protected, until some person, having the same absolute power of disposition, with more correct taste, comes into possession; and this doctrine applies in the same manner to a pleasant ride, although at the distance of two miles from the mansion-house; but I do not agree that a mere tenant for life, coming into possession, can vary the estate. That can be done only by some person having the absolute dominion over it.

A farther subject of consideration is, how far this protection can be applied to an avenue or ride through a wood, which had previously supplied timber for the purpose both of repairs and sale; how far the act of making that ride is to be considered as a consecration of the wood to this purpose of ornament. It seems to me rather a strong proposition, that, if tenant in tail or in fee, whose predecessors had supplied all the exigencies of the estate and all their own exigencies by an appropriation of the timber and sale of part of it, forms a ride or avenue, all the withered arms and branches must remain forever in that state, which one of the affidavits, on which this injunction has been granted, and this issue directed, represents as most ornamental on a Yorkshire estate. I have known instances on an application for an injunction of an inquiry directed before the Master to ascertain whether trees were planted or left standing for ornament: a course which I can easily conceive may lead to a great length of unnecessary proceeding, and prove extremely prejudicial. A tenant for life without impeachment of waste has the right by law to cut timber, and apply the produce to his own use; and if this court restrains the exercise of that legal right without making the party, at whose instance the injunction is granted, give ample security to insure justice being done, in case it should turn out, that the restraint ought not to have been imposed, it may

happen, that after the death of that tenant for life his estate may lose the value of that timber which he had a legal right to cut. In a case of this sort it is extremely difficult to ascertain whether this timber was planted or left standing for ornament by a person having such an interest in the estate that his will was to control those who were to take after him; and, when the affidavits leave the question excessively doubtful, the court cannot possibly send it to a farther inquiry, unless the person calling for it will give such security that, if it shall appear that this lady had the right to cut, and ought not to have been restrained, she, or those who take after her, shall be reimbursed the whole value.

Although I do not recollect an instance of sending such a question to a jury, I think there may be cases in which that course ought to be taken; admitting both a more speedy and a better decision than in the Master's office: but it would be extremely dangerous to send it to a jury without very special directions, not only for ample security, but also confining the issue to these questions; whether the timber was planted or left standing for ornament, and by whom; and what estate that person had: otherwise we shall be left just where we were, with a verdict upon evidence such as these affidavits afford amounting to no more than that, which no man can doubt, that these woods are ornamental to this estate. Another inquiry must be added (for this does appear to me to go considerably beyond what has been the doctrine of this court), whether the act of cutting rides through a wood, certainly a circumstance of evidence, that the wood was in some measure appropriated, and intended to be appropriated, to the purpose of ornament, is inconsistent with cutting a great part of that wood, leaving sufficient to answer that purpose of ornament; and upon this the acts of the owner, who made those rides, will be extremely material; as, if that owner, after those rides were made, had been in the habit of cutting in that wood for the purpose of repairs and sale, it cannot be represented as his intention that, not a sufficient part, but the whole wood, should be consecrated to that purpose of ornament, so that a court of equity must say it shall stand until it shall be entirely decayed.

Let the plaintiff go before the Master, and give such security as will in the Master's judgment secure to the defendants the value of all the trees which the defendant shall be prevented from cutting by the injunction of this court, in case it shall finally turn out in the judgment of this court that they ought not to have been enjoined in equity; and let the Master proceed *de die in diem*. Declare that in the issue hereinafter directed it is intended by this court that the jury shall try and determine, not whether the timber in question, or any part of it, is or-

namental, but whether the timber in Prestwood, or any part thereof, ornamental or not, was planted or left standing for ornament or the purpose of shelter by any former owner of the estate: secondly, whether consistently with the purposes, for which such trees were planted or left standing, if planted or left standing for ornament or shelter, any and what part thereof may be cut for the purposes of repairs or sale; and let the jury, in case they shall find that such wood, or any part thereof, was planted or left standing for ornament or shelter by any former owner, indorse upon the *Postea* what estate and interest in the lands such former owner had.

I do not confine the directions to the mansion-house; declaring my opinion that consistently with this doctrine, which, I admit, has taken great liberties with the rights of mankind, I must abide by what has been laid down in such cases; and therefore not only the mansion-house, but these rides and shelter to the park also, must be protected.

WINSHIP *v.* PITTS.

IN THE COURT OF CHANCERY, MAY 1, 1832.

[*Reported in 3 Paige 259.*]

IN February, 1830, the complainant leased to the defendant a house and lot at the corner of Rivington Street and the Bowery, in the city of New York, for the term of eight years from the first of May thereafter. The lease contained only the usual covenants to pay the rent, taxes and assessments, and to deliver up the possession of the premises at the end of the time, in good tenantable repair, etc. At the time of the execution of the lease, there was a dwelling-house upon that part of the lot which fronts upon the Bowery, the lower room of which was fitted up and occupied as a druggist store. But the rear of the lot was vacant land, and only used as a yard or enclosure for the accommodation of the house. In March last the defendant concluded to erect a brick dwelling upon the rear of the lot adjoining Rivington Street; and he made an agreement to under-let the same for the residue of the term, to be used as a livery stable. He accordingly took up the fence upon that part of the lot, and commenced the erection of the building. The complainant thereupon filed a bill before the Vice-Chancellor of the first circuit, and applied for an injunction to restrain him from proceeding with the building. Upon the hearing of both parties before the Vice-Chancellor, the injunction was refused. The complainant then filed a new bill before the Chancellor, but without disclosing the fact of the previous appli-

cation to the Vice-Chancellor, and obtained an order to show cause why an injunction should not be granted.

E. T. Pinckney for the complainant.

J. R. Hedley for the defendant.

THE CHANCELLOR.¹ After an application had been made to the Vice-Chancellor in open court, and been denied by him, it would have been irregular to bring the same question before the Chancellor during the pendency of that suit, except by way of appeal. The nature of the application in this case, however, was not such as to render an appeal absolutely necessary; but the complainant was at liberty to discontinue that suit, on payment of the costs which had accrued therein, and to file a new bill before the Chancellor. As the affidavits on the part of the defendant do not state that the former suit is still pending, I must, for the purpose of this application, presume it was regularly discontinued before the filing of the present bill. The case must therefore be disposed of upon the merits.

If the erection of the building in question is not such a nuisance as this court would restrain if the premises belonged to the defendant absolutely, the fact that the landlord has other lots which may be affected by the occupation of the rear of this lot as a livery stable, cannot entitle him to the remedy sought by this bill. It is not pretended that there was any mistake in drawing the lease, or that it does not contain the whole of the agreement between the parties. And if the landlord wished to prevent the tenant from using the property in the manner now contemplated, which is neither illegal or immoral, he should have made such a restriction a part of the agreement, by the insertion of a proper clause to that effect in the lease.

The only question presented by the agreement between the parties as evidenced by the written contract, is, whether the erection of the livery stable on the rear of this lot is either legal or equitable waste. If the taking up of the fence, and the removal of the out-building a few feet from its former location, was waste, the complainant had a perfect remedy at law for that injury. This court only interferes to prevent *future* waste, except in cases where the complainant has no remedy at law, or a discovery is necessary, or where there is some other ground for equitable interference. In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplication of suits.

Some of the ancient cases restrict the tenant within very narrow limits, as to his right to alter or improve the premises held by him without subjecting him to an action of waste, or to a forfeiture of the

¹ Reuben H. Walworth.—ED.

estate. It was for a time questionable whether a tenant or a copy-holder could erect a new building upon the premises, without subjecting himself to a loss of the property.¹ But whatever doubts may have formerly been entertained on this subject, I have no hesitation in saying, that by the law of this State, as now understood, it is not waste for the tenant to erect a new edifice upon the demised premises; provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. I admit he has no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. But to apply the ancient doctrines of waste to modern tenancies, even for short terms, would in some of our cities and villages put an entire stop to the progress of improvement, and would deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion. The modern cases as to the right of the tenant to remove fixtures, or even some kinds of buildings erected for the purposes of trade or manufacture, show the change which has gradually, if not imperceptibly, taken place in the law upon this subject. And upon the principles of these modern cases, it cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was at the commencement of the tenancy; and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion for the expenses of their removal. That is the nature of the building which the defendant is about to erect on the rear of this lot. And if the landlord insists upon its removal at the end of the term, the lessee will undoubtedly be pleased to obtain such a privilege, which most tenants are anxious to secure by an express stipulation in their lease.

Even if the new edifice is permitted to remain, the complainant will not be compelled to use it as a livery stable. He may, at the end of the term, convert it to some use which will be more agreeable to the tenants of the adjacent lots, and to the occupant of the house upon the front of this.

The complainant is not entitled to an injunction; and the order to show cause must be discharged, with costs.

¹ See Ward's Case, 4 Leon. 241; Gray *v.* Ulysses, 2 Dyer 211, *b*, note; Paston *v.* Utberts, Littleton's R. 264; Hutton 162, s. c.; Cecil *v.* Cave, 2 D'Aver's Abr. 194; 2 Roll's Abr. 815; Coke Litt. 53, *a*; Keilwey 38; Darcy *v.* Askwith, Hobart's Reports 234.

RICHARD WHEELER DOHERTY, APPELLANT, *v.* JAMES CLAGSTON ALLMAN AND W. C. DOWDEN, RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 29, AND APRIL 1 AND 2, 1878.

[*Reported in 3 Appeal Cases 709.*]

APPEAL against an order of the Court of Appeal in Ireland which had reversed a decree of the Vice-Chancellor of Ireland, made on the 4th of July, 1876, in a cause in which Mr. Doherty was the plaintiff, and the two respondents were defendants.

The plaintiff had filed a bill against the defendants complaining of certain acts of waste which he alleged they had committed on lands and buildings of which they were lessees, and he was the landlord and the reversioner, and praying for a perpetual injunction to restrain them from such waste in future. The facts out of which the suit arose were these:

By an indenture of release of the 10th of May, 1762, John Bernard granted to George Sealy, his heirs and assigns, for ever, two fields, part of the lands of East Gully, in the county of Cork, at a yearly rent of £10. The fields were situated on a rising ground near the town of Bandon, and on them there had been erected some large buildings which had been used as store warehouses, and afterwards as artillery barracks, and dwellings for married soldiers.

On the 18th of October, 1798, Baldwin Sealy, in whom the grantee's interest was then vested, demised part of the premises to one Arminger Sealy, to hold the same from the 29th of September then last past, for a term of 999 years, at the same yearly rent of £10. The lease contained a covenant by Arminger Sealy, the lessee, for himself, his executors, administrators, and assigns, during the said demise to "preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition, and at the end or sooner determination of the said demise so to leave and yield up the same to the said Baldwin Sealy, his heirs, executors, administrators, and assigns." The store, which was the particular subject of this lease, was known by the name of "the northern," or "the larger store."

On the 29th of November, 1824, Robert Sealy, in whom the interest under the grant of 1762 had become vested, demised another part of the fields there to Thomas Beamish and Henry Heazle, describing them as premises then lately held by John Swete, Esq., formerly the

artillery barracks, situate at Bandon, to hold the same for the term of 988 years, at the yearly rent of £32 10s. The same covenant to "preserve, uphold, support, maintain, and keep the premises and all houses, offices, and improvements made and to be made thereon, in good and sufficient repair, order, and condition," was inserted in this lease, which also bound the tenant to yield up the premises to Robert Sealy, "his heirs, executors, administrators, and assigns, in stiff, staunch, and tenantable order, repair, and condition." The store which was the especial subject of this lease was called "the southern," or "smaller store."

All these premises were subsequently conveyed to the appellant, his heirs and assigns, for ever. He resided at Oakville in their immediate neighborhood, and the buildings were visible from his house.

Through various underleases and assignments the respondents became the lessees of the whole of the premises comprised in the lease of October, 1798. The premises were described in the lease under which they claimed, a lease for 750 years at the yearly rent of £46 8s. 1d., as "A large storehouse and kiln, now in the possession of John Hurley, also the several dwelling-houses and out-houses, and yard, back and adjoining said storehouse and kiln, now partly in the possession of John Swete and his undertenant, being part of East Gully, situate at Gallows Hill, in the town of Bandon, subject nevertheless to the several agreements made by the said John Swete with his several undertenants occupying the same, he, the said John Hurley, having agreed to take with said tenants, and to receive the said respective rents payable by them out of said premises." The boundaries of the premises demised by the lease of the 23d of December, 1835, were thus stated: "Bounded on the east by Gallows Hill, and on the south and west by Messrs. Beamish & Heazle's storehouses and fields." There was in this lease the same covenant to "maintain and keep the demised premises and improvements, etc., in as good repair and condition," and so to yield them up.

During the war which ended in 1815, and for some years afterwards, these buildings had been used for the accommodation of artillery soldiers, but they were for some time unoccupied, and were said to be falling into decay.

The respondents proposed to change many of these stores into dwelling-houses, and published advertisements for plans and specifications. After due notice of his objection to such a proceeding, the appellant filed his bill praying for an injunction to restrain, etc., alleging objections to the proposed alterations on account of the proximity of the projected houses to his private residence. Much evi-

dence was given by the respondent to show that the alterations proposed to be made in the buildings would considerably increase their value.

The cause was heard on the 4th of July, 1876, before the Vice-Chancellor of Ireland, who, expressing an opinion that this was a case in the nature of structural alteration of the premises, thought himself bound to treat it as waste, impairing the evidence of title, and therefore granted a perpetual injunction to restrain it. On appeal, the Lord Chancellor of Ireland and Lord Justice Christian directed the injunction to be dissolved, without prejudice to the right of the plaintiff to proceed, if so advised, at law.¹

This appeal was then brought.

Mr. Kay, Q. C., Mr. Jackson, Q. C., and Mr. J. D. Robinson for the appellant.

Mr. Davey, Q. C., Mr. Dauney, and Mr. O'Hea for the respondents.

The LORD CHANCELLOR (LORD CAIRNS). The question in this case arises upon two leases which are now vested in the respondent. One of them is dated in the year 1798, and is for the long term of 999 years; the other was granted in 1824, and is for the term of 988 years; the first being at the rent of £10, and the second at a rent of £32 19s. The reversion to both these leases is vested in the present appellant.

The property demised is thus described [his Lordship read the description of the premises contained in each lease, and also the words of the covenant in each].

There is not in either of these leases any power of entry for breach of covenant, but there is a power that if rent was not duly paid and no sufficient distress found on the premises to satisfy the arrears, it should be lawful to the lessor to re-enter and re-possess himself of his former estate.

That is the substance of the two leases. The property demised, so far as it consisted of buildings, was in the form of stores—and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighborhood of Bandon; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable—perhaps an exuberant—supply of store buildings, ac-

¹ Ir. Rep. 10 Eq. 362-460.

cess to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. Under these circumstances the respondent has had specifications prepared, which appear to be prepared in a careful, proper, and businesslike way, and he has had a contract made in accordance with those specifications, by which the external walls of this building are to be retained, and those external walls, where one part of the building is of a lower height than the rest, are to be raised, so that the building may be of a uniform height; internal changes are to be made, internal party walls are to be introduced, the flooring is to be altered in its level, and six dwelling-houses are to be made out of this which now is one long store. Your Lordships have before you a photograph of the building as it now appears, and an elevation of the building as it is proposed to be, has also been put in evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not almost as great an improvement as could be effected. However, so it is, and with that state of things your Lordships have to deal.

The appellant objects to this being done. The owner of the reversion subject to this long term of years objects to that which the holder of the lease proposes to do. He objects upon two grounds. He says, first, that what is proposed to be done is waste; and, secondly, that it is a breach of contract. I will invert the two grounds, because undoubtedly, if there is a breach of the contract, that is a higher and a stronger ground upon which to appeal to a Court of Equity. If there should be no ground for interposing by reason of a breach of contract, there may still, however, be ground for interposing on the ground of waste, which I will consider afterwards.

My Lords, we will, therefore, first consider the question as to the breach of contract. Your Lordships will observe that the contract is an affirmative one. There are no negative terms in it. There are no terms obliging the lessee negatively, by way of contract, not to use these premises for any purpose but stores, and not to make any alteration which would render them suitable for any purpose but that of storing corn or for goods of the same kind. Your Lordships will also see that the covenant in the first of the two leases is to "preserve, uphold, support, and maintain," not merely the demised premises, but "all improvements made and to be made thereon," and to yield them up, while the covenant in the second lease is to "preserve, uphold, support, and maintain," not only the demised premises, but "all

houses, offices, and improvements made and to be made thereon, in good and sufficient order, repair, and condition," and to yield them up. The mention of stores occurs in the parcels in the demising part of the lease. In the one case the building is called "stores," and in the other "storehouse," and undoubtedly they were stores and store-houses at the time, and probably they could not be called anything but that which they are called in the lease.

I should not wish to decide or to express an opinion absolutely upon the construction of this covenant. I am going to give to the appellant the benefit of any doubt there may be in my mind upon the subject, but I am bound to say there is in my mind very considerable doubt as to the construction of the covenant. I should be sorry to lay down any general rule as to what the word "improvements" meant in a covenant of this kind, but I must take leave to observe that, dealing with property of this description—demised on the tenure which we have here of 999 years or 988 years, bearing in mind that the stores were at the time of the demise to the respondent, coarse, open, and unfinished buildings, I should be sorry to say that if it came afterwards to be the case that in a place where the stores were absolutely useless buildings, buildings for which a tenant could not be obtained, whereas on the other hand if these stores were, by internal arrangements and fittings converted into dwelling-houses, the property could be made productive and useful—I should be sorry to say that, in a lease for such a term as this, the construction to be given to a covenant of this kind might not be held to be such as that the conversion of the store-house under the circumstances into dwelling-houses would be, or might be, an "improvement" within the meaning of that term. The consequences of a different view are to my mind extremely formidable. Without minutely examining the evidence in this particular case, I may say that there might be a case in which a building of this description, in the lapse of a portion of a very long lease of this sort, would become absolutely useless as a store; and I should be sorry to say that it had been so perpetually impressed with the character of a store, that, under a covenant of this kind, it could not be improved so as to be useful for some other purpose. But, my Lords, I repeat I will give the appellant the benefit of any doubt there may be upon that point; and I will assume in his favor that the construction is that which he contends for, and that this covenant ought to be read literally as a covenant to maintain the stores as stores, and to deliver them up at the end of the term as stores.

Now, my Lords, let us look at it in that point of view. I said that there is here no negative covenant—not to turn these buildings to any

other use. My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves. But, my Lords, if there be not a negative covenant, but only an affirmative covenant, it appears to me that the case admits of a very different construction. I entirely admit that an affirmative covenant may be of such a character that a Court of Equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interpose to prevent that being done which would be a departure from, and a violation of, the covenant. That is a well-settled and well-known jurisdiction of the Court of Equity. But in that case, my Lords, there appear to me to come in considerations which do not occur in the case of a negative covenant. It may be that a Court of Equity will see that, by interposing in a case of that kind, in place of leaving the parties to their remedy in damages, it would be doing more harm than it could possibly do good, and there are, as we well know, different matters which the Court of Equity will, under those circumstances, take into its view. It will consider for example whether the injury which it is asked to restrain is an injury which if done cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will ask also this question: Suppose the act to be done, would the right to damages for it be decided exhaustively, once and for all, by one action, or would there necessarily be a repetition of actions for the purpose of recovering damages from time to time? Those are matters which a Court of Equity would well look to, and on the other hand a Court of Equity would look to this: If we interfere and say, in aid of this affirmative covenant, that something shall not be done which would be a departure from it, no doubt we shall succor and help the plaintiff who comes for our assistance. But shall we do that? Will the effect of our doing that be to cause possible damage to the defendant, very much greater than any possible advantage we can give to the plaintiff? Now, in a case of that kind, where there is an amount of

discretion which the court must exercise, those are all considerations which the court will carefully entertain before it decides how it will exercise its discretion.

My Lords, let us then apply those considerations to the present case. Suppose the change which is contemplated by the respondent here is made in the internal arrangements of this which is now a store, will the injury be irremediable? Clearly not. Beyond all doubt as regards the immediate effect it would be beneficial and not injurious to the reversioner; he will have a much better security for his rent, and the property undoubtedly will be increased in value, and if, when the lease comes to an end, he should have that predilection which he appears now to have for a building of the character which we see represented in this photograph, it would be merely a question of money, and that not a very large sum of money, in order that the building might be brought back to the state in which it now is. Therefore there would be no injury which would be irremediable. Then will damages be a sufficient compensation? The same answer applies there—an expenditure of a sum of money, of a very moderate amount, as we see from the estimate of even that which is proposed to be done by the respondents, will bring back the building to the state in which the appellant wishes it to be. Then, again, will there be a necessity for repeated actions for damages? Certainly not; it will be one payment, and one only, and by that means the lessor will get the whole of his right.

But then, my Lords, let us look at the other side—what would be the effect upon the respondents of the interposition of the court? Here is a lease for 999 years, of which 900 years and more are unexpired, and there is a rental on that lease, and on the second lease, amounting together to £42 19s. a year. If the evidence is to be believed it is either the case now, or it may become the case, that the premises are absolutely untenantable—that no tenant can be obtained for them, or obtained for them at a rent which will produce the rent which the respondents have to pay. Repair, then, they must, for they are bound to do so by the covenant, and they have been called upon to do so. They must therefore lay out money in repairing something for which they cannot get, when it is done, an equivalent in the shape of a remunerative rent, and the court therefore for 900 years will be sentencing them, or those who succeed them, to keep the premises in a shape which will not enable them to get a remunerative rent; while, on the other hand, they would be bound to pay the substantial rent of £42 19s. a year to the landlord. It will bear hardly upon the person who stands in the position of the lessee, but it will give no present benefit whatever to the appellant, and even sup-

posing he should ever become entitled to the lease, anything he would be entitled to would be represented by the payment of an extremely moderate sum of money.

Now, my Lords, that being the case, I do not think it is denied at the Bar that on a covenant of this kind the Court of Chancery before it interferes to prevent what was said to be a departure from the terms of the covenant must exercise its discretion with regard to the whole of the circumstances of the case—it appears to me that what I have said will probably convince your Lordships that there is every reason against the exercise, by the Court of Chancery, of its power of giving an injunction, and everything in favor of its leaving this matter to be the subject of damages, for any person who thinks it worth while to bring an action for damages My Lords, I therefore think that the case, so far as it is founded on the covenant, is one which, looking upon it as an application for an injunction, entirely fails.

Then with regard to the question of waste: there is no doubt that the Court of Chancery exercises a jurisdiction in restraining waste, and where waste is committed in requiring an account of the waste for the purpose of recompensing the person who has suffered; but I apprehend it is perfectly clear that the Court of Chancery, acting in that case in advance of the common-law right, will, in the first place, consider whether there is, or is not, any substantial damage which would accrue, and which is sought to be prevented, and will make that inquiry. In the present case it appears to me to be extremely doubtful whether any jury could be found, who, after this work shall be executed in the way that is proposed, would say that any damage had been done by the work to the inheritance. And I doubt, farther, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste—and here again I will assume in favor of the appellant that it is technically according to the common law, waste—yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance. Now, there again the course which the Court of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at common law to try what damages they can so obtain. Certainly, I think here again, the Court of Chancery would be doing very great injury to the one side for the purpose of securing to the other, that slightest possible sum which would at common law be

considered the full equivalent to which he was entitled. My Lords, this was the view, in substance, taken by the Lord Chancellor of Ireland and the Lord Justice of the Court of Appeal, who in this respect differed from the Vice-Chancellor. I must say that I entirely concur with the decision at which they arrived, and therefore I would advise your Lordships, and move your Lordships, to dismiss this appeal with costs.

LORD O'HAGAN. My Lords, I am of the same opinion. I have given much attention to the case in the course of the argument, which was certainly very ably conducted from beginning to end, and I have no reason to doubt that your Lordships ought to concur with the view of my noble and learned friend on the woolsack. The first consideration in the case is I think this—and it is one which has not been and could not be disputed at the Bar—that the jurisdiction as to injunctions in cases like the present is a jurisdiction to be exercised according to the discretion of the Court of Equity. Lord St. Leonards, in the case to which reference has been made, speaks of the true mode of exercising that discretion, manifestly assuming that the discretion exists, and ought to be exercised; and that being so, the question is not whether it should be exercised wildly, indiscreetly, and capriciously, as has been suggested in the course of the argument—at all events against such an exercise a very proper protest has been made—it must be exercised according to settled principles and according to the order and practice of Courts of Equity.

Now we have, I think, established for the purposes of this decision the principles in this case by which we ought to abide. In the case of *Mollineux v. Powell*,¹ which contains perhaps the clearest dictum we have upon the matter, two conditions as to the exercise of jurisdiction in cases of waste have been very clearly pointed out, and one at least of those conditions is expressly recognized afterwards in the Irish case of *Coppinger v. Gubbins*.² Those conditions are that the waste with which a Court of Equity, or your Lordships acting as a Court of Equity, ought to interfere, should be not ameliorating waste, nor trivial waste. It must be waste of an injurious character—it must be waste of not only an injurious character, but of a substantially injurious character, and if either the waste be really ameliorating waste—that is a proceeding which results in benefit and not in injury—the Court of Equity, and your Lordships acting as a Court of Equity, ought not to interfere to prevent it. I think that is perfectly well established. On the other hand, if the waste be so small as to be indifferent to the one party or the other—if it be, as has been said

¹ 3 P. Wms. 268, n. (F).

² 3 J. & Lat. 411.

by a great authority in our law, such a thing as twelvepence worth of waste, a Court of Equity, and your Lordships acting as a Court of Equity, ought not to interfere on account of the triviality of the matter. Now, in my view of the case, those principles decide the question so far as this portion of it is concerned; for it appears to me that we have here established to the full satisfaction of your Lordships, by a series of authorities to which I shall not refer, that the waste, to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage. Your Lordships are the judges not only of the propriety of exercising your discretion, but of the facts by which the exercise of that discretion ought to be regulated. Now, with reference in the first place to the materiality of the waste, we have in the analogy of proceedings in the courts of law a very important guide for the exercise of our equitable jurisdiction. It is established not only in the case of *The Governors of the Harrow School v. Alderton*,¹ before Lord Eldon, but in every case, that if there be a trial at law, and if the result of such trial is that the jury is compelled to give nominal damages, such as three farthings in that case, the verdict will be entered, not for the man who obtained the nominal damages, but for the defendant in the case. It is rather an extraordinary jurisdiction, no doubt—it is an equitable jurisdiction exercised by a court of law—but it seems to be quite established and quite recognized, and being so I think it is impossible to say that when we come to exercise our jurisdiction, which is a discretionary jurisdiction, we should act upon any other principle, or to say that if we see that the damage has not really been substantial and important, we should do that in a Court of Equity according to our discretion, which even in the strictness of a court of common law is not done because of the reason given.

I think that the judgment in the court below in the first instance went very much upon the view that the waste here had the effect of destroying the evidence of title. A great deal was said also at the Bar upon that subject, and a great deal certainly was said by the learned Judge who pronounced the original judgment in this case. Now I cannot myself see that there is anything at all in that. I do not think that in the particular circumstances of this case there is any interference with the evidence of title. You may do what you please with this particular building (according to the plans and views of the parties connected with it), and yet not destroy any evidence of title at all. The building is to be modified—is to be improved—but it is to remain where it was, it is to be of the same proportions, it is to

¹ 2 B. & P. 86.

have the same position, it is to have the same surroundings; and I cannot see how what is proposed to be done would injure or affect the appellant's evidence of title. Independently of that, I think we must take this into account, that owing to the circumstances in which property is now situated in this country, in Scotland, and in Ireland, evidence of title of this kind is not at all of the same importance as it was in other times and other circumstances. When you have an ordnance survey, when you have a registry of deeds, when you have a system of conveyancing, the value as evidence of title, of a place of this sort retaining its particular position, is very sensibly diminished. At all events, I see no reason upon that ground to hold that there has been any diminution of the evidence of title of which the lessor of these premises can properly complain.

We have heard much comment, on the one side and the other, with reference to the length of the term in this case. I do not rely upon that as the only circumstance in the case on which the judgment of the Court of Appeal should be sustained; but when, in a case of this sort, we are asked to exercise our discretionary jurisdiction, it surely is material to see that the interest of the individual who is only to come into possession of the premises at the end of 900 years is infinitesimally small compared with the interest of the man who is the tenant, and who, with his successors, is to hold the premises all that time, upon whom the effect of our exercise of this jurisdiction would be to tie up his hands, to destroy their property, and to inflict great damage upon them during the course of these many centuries that are yet to come. I think, that being so, we have only to say this in addition, that it is scarcely a matter of possible controversy here whether or no this change is a beneficial change. We have most conclusive evidence that the change will be beneficial. We have the most clear evidence that, as the matter stands, this old dilapidated store has become useless, I presume, to any human being. Circumstances have changed; the necessity for a store of that kind has ceased, and the result has been that the store, if it be allowed to continue in its present condition—because the parties are compelled to leave it in its present condition—till the end of this term of 999 years, the whole premises will be utterly valueless; whereas, upon the other side, if you substitute for this store the houses which are contemplated, you double, you treble the security of the landlord, and give him, or whoever may live at the end of the term of 999 years, certainly not an injured property, but an improved one. Therefore, inasmuch as the waste, if waste there be, is ameliorating waste, and the injury to the property produced by the waste is not merely trivial, but absolutely non-existent, it appears to me that

upon that ground the judgment of the court below may very fairly be maintained.

Now there was one case, I think it is the only case, referred to by the very able and learned Judge who had this matter first before him, the case before Lord Romilly to which reference has been made from time to time, *Smyth v. Carter*,¹ which would be very strong authority if we are to take it as expressing, in the words that are used, the full opinion of that learned Lord, and an opinion reached with reference to facts which have analogy to the facts before your Lordships. But in the first place, that was a mere *obiter dictum* of Lord Romilly. It was in an interlocutory proceeding. It was without any sort of argument; and the case has, I think, no application to the case before your Lordships, and for this important reason, that in that case the observations may have been applied to the limited interest of a tenant from year to year, whereas we have to deal here with the interest of a tenant for 900 years. The circumstances are wholly different, the conditions are wholly unlike, and, therefore, the authority does not, in my opinion, apply at all to the case before us.

But beyond all that, if the latter words of the dictum, that the landlord has a right to exercise his own judgment and caprice as to whether there shall be any change, were to be taken in their literal sense, and as applicable to this case, the effect would be to make the landlord absolute arbiter of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years. Now, my Lords, I for one should be prepared to exercise the jurisdiction of this House, and say that this is not and cannot be the law. Upon this ground I think that the judgment may now well be sustained.

As to the matter of the covenant, my noble and learned friend on the woolsack has dealt with that so largely and so well that I shall not make any observation upon it, except to say that, though it appears to me that it is not necessary to give an opinion upon the construction of that covenant, yet, looking at it in its plain and simple sense, the word "improvements" inserted in that covenant appears to me large enough to let in a change of this description, and indeed indicates that there existed in the minds of those who entered into that contract at the time, a very reasonable view that, the term being so enormously long, and the changes of the world and of society being such as they necessarily must be during that period, there ought to be a precaution taken so that in the course of these many centuries there might be made, according to circumstances, changes which in themselves would be improvements, according to the exigencies of

¹ 18 Beav. 78.

society and the position of the individuals concerned. Therefore I think that, if it were necessary to decide that question, it would be very difficult to hold that there was a breach of this covenant in that particular regard, and that the word "improvements" might not possibly—I only say that—might not possibly be held to reach a case of this description, where it is proposed to substitute for a tumble-down old store a substantial house or set of houses, from which the tenant would derive a very fair income, and from which the landlord would derive a very much enlarged security. Therefore with reference to the covenant, there being no negative words in it, it appears to me impossible, having regard to the authorities, to say that if the case of the appellant fails with reference to the waste, it ought to succeed on the matter of the covenant.

On the whole, I fully concur with my noble and learned friend, that, if there be damage in the case, a court of law can deal with that question, and I am quite clear that, our jurisdiction being discretionary, our discretion ought to be exercised in refusing the injunction.

LORD BLACKBURN. My Lords, I am of the same opinion. The jurisdiction of the Court of Equity to enforce the specific performance, or to grant an injunction to prevent the breach of a covenant, is no doubt a discretionary jurisdiction, but I perfectly agree with the view expressed by your Lordships that the discretion is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity, but is a discretion to be exercised according to the rules which have been established by a long series of decisions, and which are now settled to be the proper guide to Judges in Courts of Equity. Without professing to speak definitely as to the everyday practice of such courts, with which I have not always been familiar, I may observe, though with diffidence, that very early in the consideration of this case I came to the conclusion that, in this particular instance, the Judges of Appeal in Ireland were quite right in exercising their discretion and refusing to grant the injunction.

I will take the question of the covenant in the contract first. Wherever a consideration of a covenant, and examination into its words and meaning, reveal that the plain intention of the parties was that the lessee might have possession of the land, whatever it may be, on the express bargain that a particular structure was to be kept up, or a particular thing was not to be done, and that the lessor stipulated for that, and the lessee came in and took possession of the premises on the terms that he was to keep that bargain, there, as a general rule, the Court of Equity would not do its duty if it did not enforce the contract, because mere damages would not then afford a suffi-

cient or adequate remedy. A very good instance of it was in the case¹ where it appeared clearly that the landlord of a house for some reason, no matter what, thought it desirable for him that the house should not be used as a ladies' school, and accordingly he in express terms in the contract under which he let the house, bargained that it should not be used as a ladies' school, and a tenant, or an assignee of the tenant, came in, and occupied the premises under the contract, and yet proceeded to use them as a ladies' school. In such a case I say it would have been monstrous if a Court of Equity had for a moment hesitated, and had said that the using of the premises as a ladies' school would do the landlord no harm. The answer would be plain, whether the damages were great or little, the very bargain, on which the premises were taken, was that the tenant or his assignees should not use them as a ladies' school, and therefore he should of course be prevented from doing so.

I think, however, it would be but seldom that you could have it appear distinctly upon a lease that it was intended that a thing should not be done unless there were negative words used. But I am not inclined for my own part to base my opinion upon the mere technical difference between negative words and affirmative words in a covenant. Whether they are negative words or affirmative words are very excellent reasons in considering whether it is meant that the thing should be done, or whether it is not meant, but I do not think it is advisable upon that ground to say that while negative words would show *prima facie* you are not to do the thing, affirmative words may mean, but do not necessarily mean that, unless the whole context shows that such is the intention of the parties. Even where there have been negative words, circumstances may change, so that though the covenant still remains it would not be reasonable that it should be enforced. I think the case of *The Duke of Bedford v. The Trustees of the British Museum*² illustrates very well what I mean. There a covenant not to raise a garden wall above a certain height was made between the Duke of Bedford and Lord Montagu when they were occupying two large houses with gardens adjoining each other, and the covenant remained after Montagu House had been turned into the British Museum, and after the Duke of Bedford's garden had been turned into Bedford Square, and it was then sought to enforce it in equity against the British Museum; the Duke of Bedford acting no doubt for the benefit of the tenants of his houses in the square. What Lord Eldon said was, If he has a right to enforce the contract he may enforce it, but circumstances have been so changed

¹ *Kemp v. Sober*, 1 Sim. (N. S.) 517; 20 L. J. (Eq.) 602.

² 2 My. & K. 552.

by time that it is unjust and unreasonable to enforce in equity this contract against the British Museum in favor of Bedford Square, though he would enforce it without much hesitation in favor of the Duke of Bedford against Lord Montagu, if they had been both occupying their gardens at the time. That strikes me at once as the common-sense view of the matter. As long as it is fair and right and proper that the court should enforce the bargain which is made, the court does enforce it, even although it might think the bargain a foolish one; it is a bargain, and being one must be enforced.

I am inclined to think that construing the covenant in the present lease as one would construe a covenant at law, it means that the lessee should keep up the store-house or stores such as they were, that they were to be kept repaired and maintained. And although there are other words to say that they are also to maintain any improvements there, and, in the second lease, that they are also to keep up and repair any houses that may be built (showing clearly enough that the parties contemplated that improvements of the buildings might be made), still I am inclined to think that the meaning of the covenant was that the stores should be kept and maintained and repaired; and to pull them down and make a serious alteration of them, however it might appear to improve the property, would be a breach of that contract. I do not think it is necessary to decide that, but I think, putting it in the most favorable way that it can be put for the appellant, the contract may be said to bear that meaning, and I will assume it bears that meaning; but I am equally clear that no one after reading that contract, and having no regard to the technical point as to there being affirmative or negative words, could say there is anything in that contract that amounted to a stipulation such as the one which I have mentioned of not using the house as a ladies' school. There is nothing in the covenant which would be of the essence of the contract, or a stipulation of that sort which would lead a Court of Equity in its discretion to say that the parties have bargained that this should be a store, and never should be changed from a store, and that therefore the bargain so made shall be kept in force for the 999 years.

When a bargain of that sort is made, the question as to whether the Court of Equity would or would not interfere to enforce it must depend upon circumstances. A case might very well arise where affirmative words involve a negative. I think myself the true construction of saying I will maintain a storehouse involves the negative—I will not pull it down. But when a Court of Equity has to consider whether it shall interfere, it would take into its view these grounds—I will not repeat them—which the Lord Chancellor has mentioned to be considered. Is it a contract which must be enforced because

damages will be inadequate? No. In the case of the school it was so. Is it a case in which irreparable mischief and damage would be done by pulling down the storehouse? I do not say there could not be such a case, and a very important element to consider is whether the term of the lease be long or short. In such a case as that of *Smyth v. Carter*,¹ if it could be really established that there was a tenancy from year to year, and that the notice to quit would expire at the end of eighteen months, I am not at present required to say, and I do not decide, that a Court of Equity might not say, that when a man was pulling down the house for the purpose of making improvements, such an act would be irreparable. The court might say to the tenant: You are going to build a brewhouse which you say would be much better, but you will not finish that brewhouse before your notice to quit expires. You cannot get any good out of it, your alteration is one which can do you no good, and which the landlord says he objects to strongly, and upon such a matter as that I think he would be entitled to exercise his own will, though that might not be an advantage to him.

I am not by any means prepared to say a Court of Equity would not interfere there and grant an injunction, and very properly. But when we come to such a case as this, where there was originally a long term of 999 years of which upwards of 900 still remained to run, and the premises as they are proposed to be altered will evidently be more than ample security for the rent, the risk of damage to the plaintiff is extremely small, and, as was pointed out by the noble and learned Lord on the woolsack—I will not repeat it—the certainty of inconvenience and injury to the tenant is very great; therefore it seems to me upon these grounds, so far as the covenant is concerned, the Judges of Appeal were quite right, in the exercise of their discretionary power, to refuse to grant an injunction to prohibit the alterations on the ground of the covenant. My Lords, I have already said that, whilst I feel no doubt about that, I am very glad that the Lord Chancellor, who has had so much more experience in equity matters, has taken the opportunity of stating the course of practice in the Courts of Equity in dealing with these matters, which practice agrees exactly with what seems to me to be the common sense of the thing, as derived from the considerations as to what would be the effect of covenants of this sort.

Now, as to the question of waste, I think that is even still clearer.

The old writ of waste is gone, and we have nothing to do with it now, but an action in the nature of waste still exists in the courts of common law. It is perfectly clear that in an action of waste you

¹ 18 Beav. 78.

cannot recover nominal damages only, you must get real damages. The jurors must not find for you unless they think there is substantial and real damage. Now, as to what constitutes real damage, it is clear that in a case where jurymen found three farthings they found no damages at all; and in the case of *Doe d. Grubb v. Lord Burlington*,¹ where it was a question whether it was waste so as to forfeit a copyhold, the probabilities are that the pulling down of a barn there was not waste, because it was a taking down of an old structure which had become practically useless, and the act was not an injury to the inheritance at all. But even supposing there was an injury, and that there was something for which there might be damages recovered, is it obligatory upon a Court of Chancery to grant an injunction to prevent it under all circumstances? I think not. I think it goes on much the same principles as have been mentioned before. I find in that case of *Greene v. Cole*² it is laid down that the Court of Equity would not interfere and grant an injunction to restrain waste where the damages are trivial. Lord Eldon, in *The Governors of Harrow School v. Alderton*,³ mentioned the practice which the courts of law have established, that they would not enter judgment for the defendant where the damages were very small. Blackstone says⁴ twelve pence, but what the value of that twelve pence was you must go back to the days of King Richard to ascertain. I suppose it would be a larger sum than now, but still a small sum. I do not know whether stronger words could be used than those of Lord Eldon as to what was or was not trivial. That was his view of the matter. In the case Mr. Kay was referring to,⁵ the jury found it was improving waste, but it was held to be waste "notwithstanding the melioration, by reason of the alteration of the nature of the thing, and the evidence thereof," and the jury gave a verdict accordingly with 100 marks damages, and the Lord Chancellor seems to have entertained the suggestion that he might relieve the defendant from that verdict. What the Lord Chancellor did was at the defendant's instance, who had these damages awarded against him. The report is rather unintelligible, but it is evident that the Lord Chancellor, so far from thinking that the Court of Equity would be bound to grant its aid to enforce proceedings for waste where the property was actually improved, though its nature was altered, entertained serious doubt whether he would give relief in such a case. But when you come to the later cases, I think they are all uniform, that if the waste be

¹ 5 B. & Ad. 517.

² 2 Wms. Saund. 252.

³ 2 B. & P. 86.

⁴ 3 Com. 228.

⁵ *Greene v. Cole*, 2 Wms. Saund. 252, sec. 259, n.; *Cole v. Green*, 1 Lev. 109, see p. III.

something that would improve or would only trivially affect the inheritance, the court will not interfere. Lord Chancellor Sugden, in the case in Ireland¹ which has been cited, explains that point, I think, very clearly. In the particular case where the waste was, he did grant the injunction—and that is intelligible enough—where from inadvertence in granting a long lease, a lease renewable for ever, mines or some thing of that sort which were not known or thought of were not included in the lease, and where the landlord could not enter upon the mines because he did not reserve the power, the only thing to be done under the circumstances was for the lessor and lessee to make an agreement as to how they should divide the profits of the mines. That was obviously the right course to take. Now, in such a case as that, where the tenant chooses to take upon himself to carry away the minerals bodily, it seems but right he should not be allowed to do that, and that there should be an injunction to prevent it. That was exactly the case before Lord Chancellor Sugden. It was not, however, a case of a mine of copper ore, but was a turbary from which the lessee was cutting the peats and selling them at the rate of £300 or £400 a year, and deriving a large revenue from their sale, it was quite plain that the lessor was entitled to say, "You have no right whatever to cut and carry away this turf of mine without my consent, and my consent you must pay for—you must make a bargain," and that, I take it, was the ground upon which Lord Chancellor Sugden's decision rested. I have no occasion to say whether that was right or wrong, but it was intelligible, and very different from the present case. Here the whole story shows that if there be waste, and I think it very doubtful that a jury would say there had been a real substantial damage even to the value of a shilling, the mischief that would accrue to the tenant from forbidding him to make this alteration would be so very great, and the mischief which could possibly, upon any reasonable contemplation of the matter, accrue to the plaintiff, the lessor, would be so very small and remote, that I think that upon that ground the court was quite right in saying that their discretionary power to restrain should not be exercised.

I will only say one word about the alteration of evidence of title. I can perfectly understand that five or six hundred years ago that was an extremely serious matter, that where the evidence of title depended entirely upon the memory of witnesses, to change a meadow into a wood or a wood into a meadow would have been a serious matter as far as regards the evidence of title. After a few years it might be very difficult to trace which had been which. But nowadayas, when there are ordnance surveys, and where, as in Ireland, there is a court

¹ *Coppinger v. Gubbins*, 3 J. & Lat. 397.

especially dealing with the titles to estates, giving titles, and where the property is marked out on a map, which map can be identified with the ordnance map—and these maps it may well be supposed will continue to exist and may be referred to to the end of the term—any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal. I think, if it is put in that way, it would scarcely be gravely said that a Court of Equity should grant an injunction or that the court should act upon the rules of a former time and grant an injunction, because of a theoretical absurdity such as a supposed injury to title. I think, therefore, upon the whole, that the decision of the Court of Appeal was perfectly right, and should be affirmed with costs.

LORD GORDON entirely concurred.

Order of the Court of Appeal in Ireland affirmed; and appeal dismissed with costs.

MARQUIS D. L. GAINES ET AL. *v.* THE GREEN POND
IRON MINING COMPANY ET AL.

IN THE COURT OF ERRORS AND APPEALS, MARCH TERM, 1881.

[*Reported in 33 New Jersey Equity Reports 603.*]

ON appeal from a decree of the Chancellor, reported in *Gaines v. Green Pond Mining Co.*¹

Mr. Barker Gummere for appellants.

Mr. Henry C. Pitney for appellants.

The opinion of the court was delivered by

VAN SYCKEL, J. The bill in this cause was filed by the complainants as owners of the remainder in fee of a large tract of wild lands in the county of Morris, to restrain the defendants, who, it is alleged, have only a life estate in said lands, from cutting timber and working the iron mines on said premises, and also praying for an account.

Two principal questions are raised by the defendant's answer: First, whether Robert L. Graham, through whom the complainants derive their title, was the legitimate son of Charles M. Graham, the third. Second, whether, if Robert's legitimacy is established, the working of the mines by the life tenants, under the circumstances shown in this case, is waste.

The complainants allege that Charles M. Graham was married clandestinely to Cornelia Ludlow in July, 1847, and they admit that it was not followed by open cohabitation. Under such circumstances

¹ 5 Stew. Eq. 86.

the law will cast upon the complainants the burden of proving the fact of marriage by very clear and persuasive evidence.

It is not deemed necessary to discuss the testimony on this branch of the case; it is sufficient to say that a careful consideration of it has left no doubt in my mind that the Chancellor is justified in the conclusion he reached upon this point.

The complainants, therefore, as owners of the remainder in fee, are entitled to protect their estate against waste by the life tenant, or those claiming under her.

The land in question is very rough and mountainous, and almost all of it unfit for cultivation. On it there is a thin covering of wood and timber, with a large deposit of valuable iron ore underlying it. About the year 1812, Dr. Graham, then owner of the fee, excavated the iron ore for the purpose of manufacturing copperas, sulphur being combined with it in such proportions as made it available for that purpose. He made at least two openings, from ten to fifteen feet deep, out of which the ore was raised, and carried on this business for several years. There was erected upon the premises a building used for pounding the ores, and other apparatus for treating them. There was no digging for ore from the time Dr. Graham quit working (about 1812 or 1814) until about forty years ago, when a small quantity of ore was taken out and tested at two different forges in the neighborhood, and was considered to be without value as iron ore, on account of the sulphur it contained. From that time there has been no mining upon these premises until the Green Pond Iron Company commenced its operations in 1872.

By the strict rule of the common law, the opening and working of a mine by a tenant for years, not opened in the lifetime of the previous tenant in fee, was, equally with the cutting of timber, an undoubted waste of the estate. In *Hoby v. Hoby*,¹ the widow was held to be dowable of a coal work. It was resolved in *Saunders's Case*,² that "if a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig in it, for inasmuch as the mine is open at the time, and he leases all the land, it shall be intended that his intent is as general as his lease."

The tenant for life, subject to waste, cannot open a new mine.³

And if a lease of land be made, and some mines are open and some not, the open mines only can be wrought.⁴

But a tenant for life may open the earth in new places in pursuit

¹ 1 Vern. 218.

² 5 Coke 12.

³ Whitfield *v.* Beuitt, 2 P. Wms. 242.

⁴ Astry *v.* Ballard, 2 Lev. 185.

of an old vein of coals, when the coal mine had been opened before he came in possession of the estate.¹

*Stoughton v. Leigh*² was a case directed out of the high court of chancery for the opinion of the law judges.

The case involved the right of the widow to dower in certain mines on an estate of which her husband had died seized. The mine had been opened and wrought, but had ceased to be worked long prior to the husband's death. The question was whether the widow, in virtue of her estate in dower, was entitled to work the abandoned mine for her own benefit.

The judges answered that the widow was dowable of all the mines which had been opened and worked in her husband's lifetime, and "that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband, in his lifetime, or by those claiming under him, since his death."

In *Viner v. Vaughan*,³ Lord Langdale said:

"A tenant for life has no right to take the substance of the estate by opening mines or clay-pits; but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it, and for this reason that the author of the gift has made them part of the profits of the land."

A temporary injunction was granted, so that the right of the life tenant to work the clay-pits might be passed upon. That this case did not receive a thorough consideration, is shown by the fact that *Stoughton v. Leigh* was not referred to.

This subject was carefully considered by Lord Romilly, in *Bagot v. Bagot*,⁴ where he says:

"With respect to the abandoned, or, as they are called in the pleadings and evidence, the dormant mines, I am of opinion that it has not been shown that he committed waste in working those mines. It is always a question of degree to be established by evidence, whether the working of a mine which has been formerly worked, is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months, or two years, previously to the tenant for life coming into possession, must still be considered an open mine. A mine which has not been worked for one hundred years cannot, I think, be properly so treated. My present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working, might, without committing waste, be worked again

¹ *Clavering v. Clavering*, 2 P. Wms. 388.

³ 2 Beav. 466.

² 1 Taunt. 402.

⁴ 32 Beav. 509.

by a succeeding tenant for life. But, if the working of the mine had been abandoned by the owner of the inheritance many years previously, with a view to some advantage which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, I doubt whether a succeeding tenant for life could properly treat that as an open mine."

In *Elias v. Griffith*,¹ Lord Selborne says:

"Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life, or other owner of an estate impeachable for waste, may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt if a mine or quarry has been worked for commercial profit, that must, ordinarily, be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e.g.*, for the purpose of fuel or repair to some particular tenements), that would not alone give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own particular circumstances) can have been intended to introduce a condition or qualification not previously known, into the law of mines.

"The other observation which I desire to make is, that when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or quarry; and for this, authority is to be found in the cases which were cited at the bar, of *Clavering v. Clavering*, *Bagot v. Bagot*, and *Lord Cowley v. Wellesley*."

In *Elias v. Griffith*,² Lord Cotton remarked that

"To enable a termor, or tenant for life punishable for waste, to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor."

¹ L. R. (4 App. Cas.) 465.

² L. R. (8 Ch. Div.) 521.

The case of *Clavering v. Clavering*,¹ which recognizes the right of the life tenant to open new pits or shafts, for the working of an old vein of coal, has never been overruled in the English courts.

These citations show that, in England, the life tenant has a right to use a mine for his own profit, where the owner of the fee, in his lifetime has opened it, even though he may have discontinued working upon it for a long period of years.

The rule by which the right of the life tenant is to be tested is not the length of time that may have elapsed since the last working of the mines, but it depends upon whether the owner of the fee merely discontinued the work for want of capital, or because it did not prove profitable, or for any other like reason, or whether he abandoned it with an executed intention to devote the land to some other use.

A mere cessation of work, for however long a period, will not defeat the life tenant's right, but an abandonment for a day, with a view, in the language of Lord Romilly, "to some advantage to the property, which the fee owner considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral," would extinguish any claim on the part of the life tenant. If the fee owner should sink a shaft, and afterwards erect a dwelling-house over it, or if he should fill it up and devote the space to agricultural purposes, it would indicate, so clearly, his intention to devote his estate to other uses than mining, that the life tenant could not base any right upon the prior opening.

The distinction between mere cessation of use and such an abandonment as has been adverted to, is recognized in the cases in this country.

In the New York Supreme Court, a widow was held to be dowerable of a bed of iron ore, although the openings which had been made by the husband had been partly filled up and the work discontinued in his lifetime.²

Chief-Judge Shaw, in *Billings v. Taylor*,³ expresses the like view: "Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used during the lifetime of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death, by the heir or his assignee."

Stoughton v. Leigh, *Coates v. Cheever*, and *Billings v. Taylor*, are cited with approbation by Chancellor Green, in *Reed v. Reed*.⁴

The American cases have modified the law of waste, to adapt it to

¹ 2 P. Wms. 388.

² *Coates v. Cheever*, 1 Cow. 460.

³ 10 Pick. 460.

⁴ 1 C. E. Gr. 248

the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and undeveloped lands.¹

In *Neel v. Neel*, a coal mine had been opened and worked for family use, and for the benefit of the neighbors, but a very inconsiderable quantity had been taken out. In that case, Judge Lowrie said:

"It seems, in this case, that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines, etc., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and, if necessary to the proper working of them, to make new openings in the ground."

In support of these views he cites the English and American cases, and expresses himself without reference to the statute of 1848.

Chancellor Kent says:

"The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country."²

The cases referred to will show a strong inclination to amplify the privileges of the life tenant.

In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction.

The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored.

When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose, has some support in the adjudications in this country, and is certainly not without reason to uphold it.

To maintain the right of the appellant in this case, it is not necessary to broaden the rule to that extent.

The openings in this case were such as, under the English cases,

¹ *Hastings v. Crunckleton*, 3 Yeates 261; *Findlay v. Smith*, 6 Munf. 134; *Bal-*
lentine v. Poyner, 2 Hayw. 110; *Neel v. Neel*, 7 Harris 323; *Irwin v. Covode*,
12 Harris 162.

² 4 Comm. 76.

will establish the right in the life estate to pursue the workings upon the veins which had been opened.

It is sufficient to show that openings were made and ore taken out with a view to profit, and it is wholly immaterial whether the ore was used in the manufacture of copperas or for some other commercial purpose.

The evidence shows a mere cessation of the work, not such an abandonment, in the legal sense of that term, as will defeat the right of the life tenant. The length of time during which cessation continued is immaterial, so long as the fact of abandonment is not established.

The decree of the Chancellor, so far as it denies the right of the appellants to work the veins of ore upon which the openings had been made in the lifetime of the owner of the fee, and so far as it enjoins such work, should be reversed, and in other respects affirmed.

Decree unanimously reversed.

CHARLES DUNCOMBE v. HORATIO O. FELT.

IN THE SUPREME COURT OF MICHIGAN, JUNE 6, 1890.

[*Reported in 81 Michigan Reports 332.*]

APPEAL from Van Buren. (Buck, J.) Argued May 16, 1890.
Decided June 6, 1890.

Bill to restrain the cutting and removal of timber and the commission of waste. Defendant appeals. Affirmed. The facts are stated in the opinion.

Spafford Tryon and A. J. Mills for complainant.

F. J. Atwell for defendant.

[The points of counsel are stated in the opinion.—REPORTER.]

LONG, J. The bill was filed in this cause for an injunction to restrain the defendant from cutting and removing any of the timber or trees standing or growing upon the premises described in the bill, and from committing or permitting any waste of said premises.

The bill alleges that complainant is the owner in fee of the premises, containing about 160 acres, subject to a life estate in the defendant; that the complainant derived his title through a sheriff's deed, upon an execution sale to satisfy a judgment against Seth H. Felt; that said Seth H. Felt derived his title through a deed made and executed to him by the defendant, Horatio O. Felt, and his wife; that at about the time of the conveyance of said premises to Seth H. Felt he made, executed, and delivered a lease in writing to Horatio O. Felt and wife. This lease is set out in full in the record.

The bill also alleges that said Horatio O. Felt is in actual possession and occupancy of the premises under and by virtue of said lease, and that his wife is now deceased; that upon about nine acres of said premises is growing and standing a large amount of valuable oak and other timber, fit for sawing and lumbering purposes, and that said timber constitutes a large portion of the value of said premises. The bill then states:

"Your orator further shows that the said Horatio O. Felt has caused to be cut, and is causing to be cut, and is cutting, lumbering, and removing, from said premises, a large portion of said timber and trees growing thereon, and threatens to continue so to do, and has already cut about five acres of said timber.

"Your orator further shows that thereby the said Horatio O. Felt is committing waste upon said premises and irreparable injury thereto, and materially lessening the value thereof.

"Your orator further shows that if the said Horatio O. Felt is permitted to continue to cut down said timber and lumber, and commit waste upon said premises, as aforesaid, and is not restrained from so doing by an order and injunction of this honorable court, the value thereof will be depreciated to the amount of at least five hundred dollars.

"And your orator further shows that said cutting and removing of said timber and said lumber upon said premises by said Felt has been and is being done without the authority or consent of your orator, and against his wishes and direction thereon, and without any authority or right in said Felt so to do.

"All of which actings and doings of the said Horatio O. Felt, who is made defendant herein, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator."

The lease set out in the bill of complaint was executed before the complainant derived his title under the sheriff's deed, and contains the following clause:

"To have and to hold the said demised premises, with the appurtenances, unto the said parties of the second part, their executors, administrators, and assigns, for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying therefor, during the continuance of the lease, unto the said party of the first part, nothing; this lease being given in consideration of the second parties having conveyed the premises herein described to the first party; and under no consideration whatever are the second parties to be removed from the possession of the said premises except as they shall voluntarily surrender their rights under

this lease. And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made."

A general demurrer was filed, and on the hearing in the court below was overruled, and a decree entered for complainant making the injunction perpetual. Defendant appeals.

The claim of counsel for the complainant is that on the premises there are only about nine acres of growing timber; that this timber is needed for the use of the farm, and its destruction makes a case of actionable waste, to be restrained by injunction.

The rights of the parties must be determined by the construction given to these clauses in the lease above quoted. The title to the premises was in defendant, Horatio O. Felt. When he and his wife deeded the same, they took back this lease, by the terms of which they were to have and to hold the premises:

"For and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying . . . nothing."

The consideration was the conveyance of the premises to Seth H. Felt. It is further provided in the lease that the lessees are not to be removed from the premises on any consideration whatever, except as they might voluntarily surrender their rights under the lease. Then follows the clause which it is claimed gives the defendant the right to take the timber in question:

"And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made."

The complainant acquired all the rights in the premises under his purchase at the execution sale that Seth H. Felt had, but with notice of all the conditions in this lease. It is therefore contended by counsel that the lease gave defendant the same interest or property in the estate as he had before he and his wife conveyed the lands to Seth H. Felt, and that he can deal with it in all respects as though he was the owner, the only limitation being that of duration of the estate, and that the clauses in the lease above set out in effect are equivalent in meaning with the old clause in leases, "without impeachment for waste."

Counsel for defendant insists that the doctrine laid down in *Stevens v. Rose*¹ fully sustains his claim that the defendant has the right to remove this timber, and do all other acts that he could have done as owner in fee, and that the defendant's estate is not impeachable for

¹ 69 Mich. 259.

waste. His claim is not sustained by that case. It was there held that the words,—

“To have and to hold, and to use and control as the lessee thinks proper, for his benefit during his natural life,”—

Clearly import a lease without impeachment for waste, and that the defendant had the right to do all those acts which such a tenant may exercise; but that the words were not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste. In the present case it is conceded that there are only 9 acres of timber on the whole 160-acre tract; that the defendant has already cut about 5 acres, and threatens to cut and carry away the remainder. I have never understood the rule of the common law to be so broad as contended for by counsel for defendant. The clause, “without impeachment for waste,” never was extended to allow the very destruction of the estate itself, but only to excuse permissive waste.¹ In Packington’s Case, decided in 1744, and cited by Bacon,² the plaintiff alleged that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all. Lord Hardwicke granted an injunction to restrain the waste. The lease in the case was made without impeachment of waste. Mr. Greenleaf, in his *Cruise on Real Property*,³ lays down the rule thus:

“This clause, ‘without impeachment of waste,’ is, however, so far restrained in equity that it does not enable a tenant for life to commit malicious waste so as to destroy the estate, which is called ‘equitable waste,’ for in that case the court of chancery will not only stop him by injunction, but will also order him to repair if possible the damage he has done.”

In 10 Bac. Abr. tit. “Waste,” p. 469, it is said:

“So, where a lease was made by a bishop for twenty-one years, without impeachment of waste, of land that had many trees upon it, and the tenant cut down none of the trees till about half a year before the expiration of his term, and then began to fell the trees, the court granted an injunction; for, though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for, though he had power to commit waste, yet this court will model the exercise of that power.”⁴

At the common law no prohibition against waste lay against the

¹ 10 Bac. Abr. p. 468, tit. “Waste.”

² Reported 3 Atk. 215.

³ Volume I, *129.

⁴ Citing Abraham v. Bubb, Freem. Ch. 53.

lessee for life or years deriving his interest from the act of the party; the remedy was confined to those tenants who derived their interest from the act of the law. But the timber cut was, at common law, the property of the owner of the inheritance, and the words in the lease, "without impeachment of waste," had the effect of transferring to the lessee the property of the timber.¹ The modern remedy in chancery by injunction is broader than at law, and equity will interpose in many cases, and stay waste where there is no remedy at law. Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste.² In the case of *Kane v. Vanderburgh* it was said:

"Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court."

In this State an action on the case for waste is authorized by chapter 271 How. Stat. This has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the statute of Gloucester, as the owner now recovers no more than the actual damages which the premises have sustained, while that statute gave by way of penalty the forfeiture of the place wasted, and treble damages; and this harsh rule was adopted by many of the American States by the early statutes. This statute giving a right of action in courts of law for waste does not, however, deprive the court of chancery of jurisdiction in proceedings to restrain threatened waste.

There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may take the timber for his own use, and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings or destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter; neither can he be permitted to entirely strip the land of all timber, and convert it into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that the life tenant is selling it for his own gain and profit. The demurrer was properly overruled.

The decree of the court below will be affirmed, with costs.

The other Justices concurred.

¹ Bowles' Case, 11 Coke, 79; Co. Litt. 220a.

² 4 Kent. Comm. 78; *Perrot v. Perrot*, 3 Atk. 94; *Aston v. Aston*, 1 Ves. Sr. 264; *Vane v. Barnard*, 2 Vern. 738; *Kane v. Vanderburgh*, 1 Johns. Ch. 11.

ANONYMOUS.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., DECEMBER 4

1729.

*[Reported in *Mosely* 237.]*

TENANT for life, without impeachment of waste, remainder to his first, and every other son in tail, becomes a bankrupt, and a commission is taken out against him, and the commissioners sell his estate to the defendant, against whom the son of the bankrupt, on certificate of his bill being filed, and affidavit, obtains an injunction to stay waste, which upon coming in of the answer was to be dissolved nisi, and the plaintiff showed for cause, that he, as tenant in tail, had a right to injoin any one from committing waste, but the tenant for life himself, and even him in a Court of Equity, from pulling down the mansion-house, or cutting down timber ornamental to it, though he has a power by law.

MASTER OF THE ROLLS. The injunction must be continued as to pulling down the mansion-house, or cutting down the timber ornamental to it; but dissolved, as to cutting of timber generally, for though there have been great variety of opinions formerly, it is now settled at law, that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life, who is dispusable of waste, and not to the remainder-man in tail, or in fee.

BEWICK v. WHITFIELD.

IN CHANCERY, BEFORE LORD TALBOT, C., EASTER TERM, 1734.

*[Reported in *3 Peere Williams* 266.]*

A. was tenant for life, remainder to B. in tail, as to one moiety, remainder as to the other moiety to C. an infant in tail, remainder over. There was timber upon the premises greatly decaying; whereupon B., the remainder-man, brought a bill, praying, that the timber that was decaying might be cut down, and that the plaintiff, the remainder-man in tail, together with the other remainder-man, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

LORD CHANCELLOR. The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God,

as by tempest, or by a trespasser, and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate.

2dly. As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

3dly. With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance, that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master; and trees though decaying, if for the defence and shelter of the house, or for ornament, shall not be cut down. B., that is the tenant in tail, (and of age) of one moiety, is to have a moiety of the clear money subject to such deductions as aforesaid, the other moiety belonging to the infant, must be put out, for the benefit of the infant, on government or real securities, to be approved of by the Master.

LUSHINGTON v. BOLDERO.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., NOVEMBER 24,
1851.

[Reported in 15 Beav. 1.]

IN 1785, the testator devised Aspeden Hall and other estates to Charles Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with similar limitations to William Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with remainder to Henry Lushington for life, without impeachment of waste, with remainder to his first and other sons in tail, with divers remainders over.

In 1812, Charles Boldero and Henry Lushington, and their partners, became bankrupt, and the assignees under their joint commission having proceeded to commit *equitable* waste by felling ornamental timber, this bill was, in 1813, filed by the eldest son of Henry Lushington, who was then and was now the first tenant in tail *in esse*. The plaintiff established his claim,¹ and the assignees were ordered to pay

¹ See *Lushington v. Boldero*, 6 Mad. 149; and G. Cooper 216.

into court £6,379 4s., the value of the timber and interest, to an account, intituled, "The account of Timber felled by the Defendants, the assignees of the Estate of Messrs. Boldero, Lushington, & Co., Bankrupts." This was done; and it was directed to accumulate, and be subject to the further order of the court. By accumulation, the fund in court now exceeded £26,000.

William Boldero died "several years since," without having been married. In 1850, Charles Boldero being still living, and ninety-five years of age, but having no issue, the plaintiff, the first tenant in tail *in esse*, presented his petition for payment to him of the fund in court. The case came before Lord Langdale on the 4th of November, 1850, when his Lordship thought, that the case could not be decided until it had been ascertained that Charles Boldero, who was living, should have no issue, and his Lordship therefore ordered the petition to stand over until after the death of Charles Boldero.

Charles Boldero died in August, 1851, and the application for payment was now again renewed.

Mr. Lloyd and Mr. Tripp in support of the petition.

Mr. R. Palmer and Mr. Goldsmid, contra.

THE MASTER OF THE ROLLS. I shall first consider what would have been the effect if Charles Boldero had himself done this act. He was tenant for life without impeachment of waste, and having cut ornamental timber, the court compelled him to pay into court the amount for which the timber was sold; and, omitting all questions respecting intermediate life estates, the question now is, whether he or the reversioner was entitled to the income of that fund. The equitable doctrine applicable to this and other similar cases is this: that no person shall obtain any advantage by his own wrong. But it is manifest that the tenant for life may obtain very considerable advantage from his own wrong, if he were to cut down timber and obtain the interest of the fund; his income for life would be thereby increased beyond what it would have been if the timber had not been cut.

It has been observed, that in all the reported cases the rule has been applied to the *corpus* of the fund; but that, I think, ought not to vary my judgment, because it depends upon this equitable and just principle, that no man shall obtain a benefit by his own wrongful act; the authorities, therefore, which lay down the principle in cases of *corpus* only, are equally applicable to any species of interest to be derived by a wrongful act.

It is then said, that this is a case in which the court does not impose a forfeiture, but only requires restitution; and that to deprive the tenant for life of the income, it would be to inflict a penalty upon

him, inasmuch as he would have had the enjoyment and advantage of the shade and mast of the timber if it had not been cut. But this he deprives himself of by his own wrongful act, and for this reason the court refuses to give him any substitution or remuneration. It is also material to bear in mind, that if the timber had not been cut, it would have increased in value for the benefit of the reversioner, but that has been rendered impossible by the tenant for life having improperly cut it. If, therefore, it is impossible for the court to ascertain what portion of the interest ought to be attributed to the estate of the reversioner, and what portion to the enjoyment of the tenant for life, it is the tenant for life who has himself put the court into that situation, and made it incapable of arriving at a just conclusion. It is not a case in which the court can act on the principle of restitution. The case put, by way of analogy, of a tenant for life selling out the fund, and being compelled to restore it, is inapplicable, because the tenant for life cannot in this case restore the subject-matter.

There may be a great number of cases in which the timber would become of great value when the reversion fell in; and it is impossible for the court to ascertain what portion of it would have been enjoyed by the reversioner if the wrongful act had not been committed. Undoubtedly the tenant for life does in some cases directly gain an advantage, but it is not by reason of his own act. Thus, where by the act of God a large quantity of timber is blown down by a storm, the produce is laid out in the purchase of stock, and the interest of the fund is paid to the successive tenants for life. So, upon the same principle, when timber is decaying and it cannot benefit the reversioner to allow it to remain standing, the court, having ascertained that it is for the benefit of all parties, orders the timber to be cut down, and the produce to be invested, and the interest of the fund to be paid to the tenants for life in succession.

When, however, the tenant for life has committed the wrongful act which produces the fund, the court will not allow him to gain any benefit from it; but the reversioner takes the benefit arising from an accretion of the fund, in lieu of the accretion of the timber.

Can I look at this case in any different point of view, because the assignees, and not the tenant for life, have done the wrongful act? The assignees stand for these purposes exactly in the same situation as the tenants for life; they are bound by the same equities, and are exactly in the same position, and the same observations apply to both. Nor am I able to separate, or to distinguish the case of Sir Henry Lushington from that of Charles Boldero; because, if the two tenants for life had concurred together, and had agreed between themselves that the one in possession should cut the timber, and that they should di-

vide the produce in certain proportions, the court would have prevented either of them from gaining any benefit from the wrongful act which they concurred in performing. Here, they are the assignees of both; and I am unable to find any principle which says, that the assignees must not stand exactly in the same situation as the tenants for life would stand, and be bound by exactly the same equities. If Charles Boldero had died immediately afterwards, and Sir Henry Lushington had survived for a very long period, and the income of the proceeds of the timber had been applied during that period in payment of the joint creditors, they would have obtained a great benefit from the wrongful act of the assignees. I must hold them in exactly the same position as if the wrongful act had been committed by Sir Henry Lushington alone. I cannot separate the characters of the assignees; they are assignees for the joint creditors and of the joint estate; and I consider that I must treat the case exactly in the same way as if the two tenants for life, one only being in possession, had concurred in the wrongful act of cutting the timber.

It was suggested, that I should suppose the possible case of the commission having been superseded; and I was asked, whether the tenant for life, Sir Henry Lushington, who is perfectly innocent in the matter, ought to be prejudiced by the wrongful act committed by his assignees. It would be hard if it were to be so; but I do not consider that question at present, because it does not arise before me. But, if the question did arise, it is manifest that the remark would apply just as much to the case of Mr. Charles Boldero's estate as to that of Sir Henry Lushington; nor can I find anything whatever in the fiduciary character of the assignees, who, in matters of this description, stand in exactly the same position as the tenants for life, to prevent their being held liable precisely in the same manner as the tenants for life themselves. They have themselves done this wrongful act; and neither they nor the persons for whom they are trustees can gain any advantage by reason of it.

I am of opinion, therefore, that, upon the petition. I must make an order according to the prayer.

The assignees appealed to the Lords Justices, but a compromise was, after argument, effected.

GENT v. HARRISON.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., NOVEMBER 18, 19,
AND 21, 1859.

[*Reported in Johnson 517.*]

GEORGE GENT, by his will dated the 8th of July, 1808, devised certain real estate to the use of George William Gent for life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gould Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to the plaintiff, George Gent, for his life without impeachment of waste, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to William Gent in fee.

By certain codicils the testator revoked the ultimate devise in fee, and declared that the remainder of his real estates should go as the law might direct.

The testator died in 1838, and George William Gent entered and continued in possession of the devised estate until the 17th of March, 1855, when he died, without having had any issue male. John Gould Gent then entered, and continued in possession until the 26th of May, 1856, when he died, without having had any issue male. John Gent had previously died without having had any issue male. The plaintiff then entered, and had since continued in possession, and had never had any issue male. The bill alleged that the plaintiff had been unable to discover the testator's heir. In the year 1820 George William Gent cut a quantity of timber, and invested the greater part of the proceeds of the sale of it in the names of the trustees to preserve; and this fund consisted, at the date of the bill, of a debenture for £5,000 of the North Western Railway Company. The rest of the proceeds, amounting to £739 14s. 6d., were retained by the said George William Gent.

The trustees paid the income of the fund so invested to George William Gent, John Gould Gent, and the plaintiff, during their successive occupations.

In 1848 George William Gent cut other timber, which he sold; and it was agreed that the amount so received and appropriated should be taken to be £1,000, and the date of receipt midsummer, 1854.

In 1856, John Gould Gent cut and sold other timber, and received

the proceeds; and it was agreed that the amount should be taken to be £900, received on the 2d of January, 1856.

The said sums of £1,000 and £900 were paid by the executors of George William Gent and John Gould Gent respectively to the trustee who held the other fund.

The plaintiff, by his bill, claimed to have all the capital which had arisen from the sales of timber, and to be paid by the executors of George William Gent and John Gould Gent the amounts received by their respective testators as income of the fund in which the proceeds of the timber were invested. There was some conflict of evidence as to whether the timber was properly or improperly cut.

Mr. Rolt, Q. C., Mr. Shapter, Q. C., and Mr. Bush, for the plaintiff.

Mr. Willcock, Q. C., for the representatives of George William Gent.

Mr. Speed for the representatives of John Gould Gent.

Mr. Chapman for the trustee.

VICE-CHANCELLOR SIR W. PAGE WOOD. The plaintiff would be put in very considerable difficulty if this were treated otherwise than as a proper cutting, followed by the investment of the proceeds for the purposes of the trust. The authorities seem to go to the full extent, that, where timber is properly cut for the benefit of the estate (as the Vice-Chancellor of England says in the case of *Waldo v. Waldo*), either by the act of the court, or out of court by the act of trustees, which the court has adopted, there it is treated as so much of the estate. Thus, in a much earlier case, *Mildmay v. Mildmay*, before Lord Thurlow, the court preferred not treating the proceeds as money, because that would change the character of the fund, but directed them to be invested in land, the effect being, that the tenant for life, although impeachable for waste, would obtain the benefit of the money when so invested. Therefore, where the timber is properly cut, the purchase-money of the timber follows the land, and the tenant for life, although impeachable for waste, receives the income during his life; and when you reach the first tenant for life unimpeachable for waste, as in the case of *Phillip v. Barlow*, he takes the capital. There would therefore be no difficulty if the plaintiff in this case had treated the timber as having been properly cut, and the fund as being his from the date of his coming into possession of the estate; but he seeks the past interest on this ground (and it is only on this ground that he can seek it)—that when the tenant for life, by his own wrong, creates the fund, as in *The Duke of Leeds v. Lord Amherst*, and some other cases, the tenant for life shall not be allowed to avail himself of his own wrong, and to receive the interest from a

fund which would never have existed but for his own wrongful act. But the cases which were cited have been cases of equitable waste, where, the whole matter having to be administered in equity, the legal right which might spring from such a wrongful act could never have arisen. In the case of legal waste, you have only to consider the legal consequences of the wrongful act as to which trover may be brought. There is no account asked for in this bill, for the whole amount is ascertained and settled, which was one of the points that arose in the last-cited case of *Hony v. Hony*. No account is asked of what timber has been cut, what it has been sold for, and the like. No account has been rendered, but the tenant for life, who has now come into possession unimpeachable for waste, comes into court with this simple case. He says: "I find the exact value of the timber cut; I ask for that value; I ask to have it paid to me; I ask to have the back interest paid on that; I do not ask for anything else: and I, being legal tenant for life unimpeachable for waste, say, this is my money." In that state of things, if he has any right at all, it is plainly a legal right, treating the original act as a wrong. There is nothing which the Court of Chancery is called upon to do; and, therefore, he should be left to his remedy at law. But who may have the legal right, is, I think, a matter of great doubt. I am by no means satisfied at present, that, when the timber was cut, assuming the cutting to have been a wrongful act from the first moment, it did not belong to the first person having an estate of inheritance. The limitations are to the tenants for life, with contingent remainders to their issue, and then a remainder to the tenant for life unimpeachable for waste, and remainders in tail to his issue. All the authorities are uniform in this respect, that, where there has been an improper fall of timber on the estate by a person having a limited interest, the first owner of the inheritance is the person who has a right to bring trover, passing over all the intermediate estates. It certainly does not appear that there was, in any of these cases, an intervening tenant for life unimpeachable; but there were contingent remainders, that might come into esse and defeat the estate of inheritance vested in the heir or the person taking in remainder, as the case might be. The reason of the thing was this—that there must be the property in somebody when the wrongful act is done. The court will not allow the tenant impeachable for waste to avail himself of his own wrong; and the law therefore vests the timber wrongfully cut in the person having the first legal estate of inheritance. The answer made by Mr. Rolt is, "that the tenant for life, although in remainder, if he is unimpeachable for waste, as in Lewis Bowles' Case, has not merely an immunity from liability for waste, but the actual property in the timber. But

how has he the property? The doctrine laid down in the 7th resolution in Lewis Bowles' Case is this: The clause without impeachment of waste gives a power to the lessee which will produce an interest in him, if he executes his power during the pendency of his estate. That is to say, if he ever comes into possession of the estate, and ever exercises his power of cutting the timber thereupon, the timber belongs to him; and the reason of its belonging to him, which is fully argued out, is this: It is said, if it had been without impeachment of waste by any writ of waste, then, by old authority, the action only would be discharged, and the lessor, after the fall of the timber, might nevertheless seize it; but when it is without impeachment of waste altogether, then the effect is, that the tenant for life cannot be interfered with in any manner in respect of that waste; and as soon, therefore, as he has exercised his power thereupon, the timber at once becomes his own property. But how does that prove, that, when the trees are felled by the wrongful act of some one preceding him, before his property has arisen thereupon, the property is in him? To say the least, that is a doubtful proposition; and that point I am asked to decide, not having the heir before me. The question is, whether such a point as that ought to be decided without the presence of the heir, and against the heir. I think the answer is plain, that, without hearing the heir upon it, I can come to no such conclusion. And further than that I see no reason to go. There seems to be considerable reason for a contention by the heir that his position is just the same in respect of a person having a possible power, which may arise if ever his estate arises, as it is in respect of the contingent interests of unborn issue, in favor of whom the law does not interfere to prevent the heir's right accruing at once, so as to enable him to bring trover immediately after the timber is cut. But there are further difficulties in the plaintiff's way, if he chooses to treat this as a tort. In the first place, of course the tort arose when the act was committed; and, if the plaintiff had a remedy by an action of trover, I apprehend the action should have been brought some twenty years ago, when the act took place. That is the first difficulty. But, secondly, suppose the plaintiff has any right of action now of any kind, his remedy is clearly at law. He is the legal owner, and if he chooses to proceed at law by an action of trover, there is his remedy. In what respect does he want the aid of this court? He asks for no injunction; he asks for no account; he asks nothing which he has not got at law. Why should he come here to insist on his right? It is put in this way: It is said, a person commits a wrong, and hands over the fund which has resulted as the produce of his wrong to another, and says, "Take care of that; I have injured somebody or other, and I ask you to hold

the proceeds for anybody who may be interested in them." I apprehend, even supposing the form of action might be varied, and that it might be an action for money had and received to plaintiff's use, the remedy would still be at law. It is not for me to determine the question, whether it should be an action of trover, or an action for money had and received. Still, taking it either way, what does the plaintiff come here for? In truth, it is only by treating the cutting as rightful, as an act which the court would recognize, that the plaintiff can have any ground for coming to this court. On that view, considering that the trustees were applied to in the first instance, there might be ground for directing an inquiry whether this cutting ought to be regarded as an act of the trustees, which the court would recognize, as it did in *Waldo v. Waldo*. If that were so, the plaintiff would be entitled to the whole of the money produced; but he would be clearly wrong in asking for the intermediate interest. If, on the other hand, he says: "You, the trustee, having received this sum of money as the proceeds of a wrongful act, ought to have held it for all the persons interested; you should not have paid any income to the wrong-doer himself, but you should have held it for me,"—that contention entirely fails, because, if the act was wrongful, the remedy is at law, and not here. If he chooses to treat the timber as rightfully cut, then the tenant for life was entitled to interest, and all the plaintiff can get is the principal, his title to which does not seem to be disputed. What seems right for me to do is this—either to dismiss the bill altogether, if the plaintiff insists on treating the cuttings as wrongful acts from the commencement, in which case I ought to dismiss it with costs; or else, if the plaintiff is content to treat the cuttings as rightful, then to make a decree for the payment to him of the capital derived from the proceeds of that timber. But I cannot do this unless the plaintiff waives any inquiry as to whether the cutting was rightful or not.

Mr. Rolt having consented to waive any inquiry, and to treat the timber as rightfully cut, the minutes of decree were as follows:

"Dismiss the bill, with costs, as against the representatives of George William Gent and John Gould Gent; and, the plaintiff not asking any inquiry whether any of the timber was wrongfully cut, the funds in the hands of the trustee to be transferred to the plaintiff; the trustee's costs to come out of the fund."

BAKER *v.* SEBRIGHT.

IN THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE,
BEFORE JESSEL, M. R., NOVEMBER 24, 1879.

[Reported in 13 Chancery Division 179.]

SIR THOMAS GAGE SAUNDERS SEBRIGHT, by his will, dated in 1851, devised his real estate, including his "Beechwood estate" in Hertfordshire, to trustees in fee, in trust for his son the defendant, Sir John Gage Saunders Sebright, and his assigns for his life, without impeachment of waste; and after his decease in trust for his first and other sons successively in tail male, with remainders over.

The testator died in 1864, whereupon the defendant, Sir John G. S. Sebright, became, under the provisions of the will, equitable tenant for life in possession of the Beechwood estate. At that time there was standing on the estate a large quantity of very valuable timber, of which part was "ornamental," and part had been planted or left for ornament and shelter.

Since he had come into possession of the estate the defendant had cut a considerable amount of timber thereon, and sold the same for sums amounting to upwards of £21,000, which, after deducting the cost of cutting, he had applied to his own use.

The plaintiffs, the present trustees of the will, alleged that some of the timber so cut and sold by the defendant was ornamental timber, and timber planted or left for ornament or shelter, which he, as tenant for life, was not entitled to cut; and they accordingly filed the bill in this action praying (1) that, so far as might be necessary, the trusts of the will, so far as the same related to the timber formerly standing and then standing on the Beechwood estate, might be carried into execution by and under the direction of the court: (2) a declaration as to the extent of the rights of the defendant, Sir John G. S. Sebright, as equitable tenant for life without impeachment of waste under the will, to cut timber on the Beechwood estate: (3) an account of the ornamental timber and of the trees planted or left standing for ornament or shelter upon the Beechwood estate (if any) which had been felled or sold by or under the direction of the said defendant, and also an account of the moneys produced by the sale thereof: (4) that the said defendant might be ordered to pay to the plaintiffs or into court for investment such sum (if any) as upon the result of the accounts aforesaid ought to be so paid, and that all proper directions might be given as to the investment and application of the fund: and consequential relief.

Sir John G. S. Sebright's eldest and only son, an infant, was made co-defendant with his father.

The defendant, Sir John G. S. Sebright, by his answer, admitted that the greater part, if not the whole, of the trees felled by him came within the description of ornamental timber, but stated that it had become absolutely necessary to fell them for the purpose of thinning out, and for the preservation and improvement of other trees of a more ornamental character: also that many of the trees so felled had stood in such close proximity to the mansion-house and other buildings on the estate as to be injurious to the health of their inmates. He further stated that he had acted throughout for the permanent advantage of the estate and under the advice of surveyors and woodmen of experience: and he submitted that under the circumstances, and having regard to the care and precautions which had been taken before any of the timber was cut, and to the fact that he was tenant for life without impeachment of waste, he was entitled to cut all the timber which had been so cut by him. He moreover submitted to account if the court should be of opinion that he had exceeded his rights as such tenant for life.

By the decree, dated the 20th of November, 1876, made on the trial of the action, it was declared that the defendant, Sir John G. S. Sebright, as equitable tenant for life without impeachment of waste, was entitled to cut all such trees on the Beechwood estate as were fit to be cut, except trees planted or left standing by any predecessor in title of the said estate for ornament, protection, or shelter: and, the defendant undertaking not to cut any of the trees on the Beechwood estate so planted or left standing, an inquiry was directed in the following form: "An inquiry whether any and what trees planted or left standing by any predecessor in title of the Beechwood estate or any part thereof for ornament, protection, or shelter, had been cut by the defendant, Sir John G. S. Sebright, and under what circumstances the same were cut, and particularly whether any and which of such trees injured or impeded the growth of any other trees adjoining or near thereto which were of so much importance for the purposes of ornament, protection, or shelter, as that the removal of the trees so cut was essential for such purposes of ornament, protection, or shelter; and whether any and which of such trees cut by the defendant, Sir John G. S. Sebright, were prejudicial to the health of the inmates of the mansion-house or the inmates of any other building on the estate, or interfered with the comfortable enjoyment of the mansion-house or any other building on the estate." And an account was directed of the value of any trees improperly cut.

In answer to the first inquiry, the chief clerk certified as to the

number and description of trees cut by the defendant, Sir John G. S. Sebright; and that "all the trees so cut were injurious to or impeded the growth of other trees adjoining or near thereto which were of so much importance for the purposes of ornament, protection, or shelter as that the removal of the trees so cut was essential for such purposes of ornament, protection, or shelter"; also that no trees planted or left standing by any predecessor in title of the Beechwood estate or any part thereof for protection or shelter had been cut by the defendant.

The evidence on the inquiry consisted principally of an affidavit by the agent and surveyor of the estate under whose advice the timber in question had been cut. The affidavit detailed the circumstances under which the timber had been cut, and corroborated the statements in the defendant's answer.

The action now came on upon further consideration, the question being whether the defendant, Sir John G. S. Sebright, had, in cutting ornamental timber, been acting within his rights as an equitable tenant for life unimpeachable for waste, and was therefore entitled to retain the proceeds of such timber for his own use.

Chitty, Q. C., and Bush for the plaintiffs.

Davey, Q. C., and Walter Morshead for the defendant, Sir John G. S. Sebright.

A. Rumsey for the defendant, the infant remainder-man.

JESSEL, M. R. I wished this point to be discussed, and I regret it has not been argued more hostilely than it has been, because the point is one of some importance, and does not appear to have been the subject of direct decision.

An equitable tenant for life unimpeachable for waste cut ornamental timber, and he alleged that he cut it, not only properly, but beneficially for the ornamental timber which remained; and accordingly an inquiry was directed in this form:—[His Lordship read it, and continued:—] I need not trouble myself about the last part of the inquiry, because the first part of it has been answered in favor of the tenant for life; that is, in effect, that the trees which he did cut injured or impeded the growth of other trees which were of essential importance for ornament or shelter: in other words, he did that which the court directed to be done in the cases of *Lushington v. Boldero*,¹ and *Ford v. Tynte*.² It seems that the trees cut were of considerable value, and of a value very much in excess of the cost of cutting; that is admitted; and consequently there was a considerable sum arising from the proceeds of the sale of the timber cut which went into the pocket of the tenant for life.

¹ 6 Madd. 149.

² 2 D. J. & S. 127, 129.

The question I have now to decide on further consideration is, whether the equitable tenant for life unimpeachable for waste is entitled to retain the proceeds of the timber so cut for his own use. If he is not, a second question arises which otherwise it is not necessary to discuss.

The point, as I said before, does not appear to have been directly decided; but, from the cases I am about to refer to, it seems to have been indirectly decided or assumed in favor of the tenant for life; and in deciding it, apparently for the first time, I have no hesitation in saying that, looking at the principles which have been laid down by the Court of Chancery as, so to say, the ground of its interference with the tenant for life in respect of what is commonly called "ornamental timber," that is, timber planted for ornament or shelter, it is impossible to hold that this tenant for life ought to be interfered with at all; that is to say, his rights, such as they would have been had the timber not been ornamental, remain unaffected by what has occurred.

The way to look at the matter is this: Courts of Equity restrained a legal tenant for life unimpeachable for waste from committing some kinds of waste which are called equitable waste. Why? Because it was considered that, though he had legal powers, he was not using them fairly—he was abusing them so as to destroy the subject of the settlement. That was the only ground, as it was said. Sometimes he was making an unconscientious use of his powers; and in fact the first case on the subject, the case of Lord Barnard,¹ who, to spite the remainder-man, took off the roof of Raby Castle, was a very striking case of the unconscientious use of those powers.

It does appear to me that the ground stated for the court's interference quite represents the true view of the matter. The Court of Equity did interfere by injunction to restrain the act of the tenant for life, because it was an unconscientious use of his powers; and therefore, unless the Court of Equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful. The legal result of his act would follow in the same way as if no such doctrine as equitable waste were known: in other words, in the case put, he rightfully cuts the timber; and really it comes to that point. Now if he rightfully cuts the timber, it must be plain that that cannot be called an unconscientious use of his powers, because he is doing that which not only the court itself would allow, but by established

¹ 2 Vern. 738.

rule will now direct to be done: and it seems to me impossible to say, when he has done that which was necessary, so to speak, in order to preserve the remaining timber for the purpose for which it was planted, that what he has done was improperly done. That does not necessarily refer to decaying timber that may be ornamental, and which the court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for waste, in the ordinary course of management, and then the proceeds are invested for the benefit of the estate. It may be prudent to cut timber which is decaying, when to do so is beneficial for all parties, and when the court has them all before it, although there is no absolute right to cut it, because it is ornamental timber. As we all know, there are oaks and other trees which will decay for centuries and still be ornamental. Therefore what I am saying does not necessarily apply to decaying timber, but it does apply to a case where the timber cut is impeding the growth of what I will call more ornamental timber; there cutting is the right thing to do.

Now, on looking at the authorities (I do not think it is necessary to cite many of them) this seems very plain. I will first take the passage in the carefully considered judgment of Lord Justice Turner in *Micklethwait v. Micklethwait*,¹ where he says:² "This doctrine of equitable waste, although far too well settled in this court to be now in any way disturbed, is (it is to be observed) an encroachment upon a legal right." I do not much admire that term "encroachment," because almost all the doctrines of equity were interferences with a legal right, and that term is rather a term of opprobrium when it ought to be a term of praise. The interference of Courts of Equity with legal rights was for the improvement of the law and the furtherance of justice, and therefore to say that a doctrine of equity is an "encroachment" on a legal right is simply to censure the whole doctrine of equity.

Then his Lordship says, "At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. It regards such an unconscientious use of the legal power as an abuse, and not as a use of it. When, therefore, the court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life, for in the absence of

¹ 1 De G. & J. 504.

² 1 De G. & J. 524.

special circumstances it cannot be unconscientious in him to avail himself of the power which the testator has vested in him."

It really comes back to this, that the Court of Equity considers that where the testator gives these powers to the tenant for life, he intends them to be used fairly. He is not to take the roofs off the houses to spite the remainder-man, and not to cut down ornamental timber so as to destroy the amenity or beauty of the estate; but beyond that the Court of Equity does not interfere when he is doing what the settlor himself would have done with a view to preserve the beauty of the estate, though he obtains a profit. He is not acting unconsciously.

I think the same result appears, although not quite so clearly, from the case of *Ford v. Tynte*.¹ In the first place let us recollect what the case was. It was an appeal by the remainder-men from order of the Vice-Chancellor Wood, authorizing the receiver to cut certain timber which was said to be ornamental timber. The order was appealed from on the ground that the directions were not in the right form. It was said that they were too wide, and the Appeal Court was of that opinion, and varied Vice Chancellor Wood's order. Now, how does the counsel for the remainder-men put it? Mr. Giffard's argument is this: "We say that if a group of trees is planted or left standing for ornament or shelter, none of the trees can be felled by a tenant for life except those the felling of which will improve others of them." That is, he can fell those. That is the argument of the counsel for the remainder-men; and then cases are cited, winding up with *Lushington v. Boldero*,² which gives the proper form of inquiry.

Then the counsel for the plaintiff, representing the tenant for life, said the remainder-men came too late; and they took another point, that there was no satisfactory evidence that the trees were ornamental. Then Mr. Giffard says in reply, "Those trees only ought to be cut the removal of which will be beneficial to other ornamental trees, and the reference ought to have been in such terms as to secure this." So he puts it that what the court will cut the tenant for life may cut. That is what it comes to.

In delivering judgment, Lord Justice Turner, after going into the matter at considerable length, and saying he thought there must be a further inquiry,³ says, "There is not, so far as I can find, any settled form of inquiry applicable to all cases of this description, nor do I think that there can be; for the question to what extent ornamental timber may be cut, must, as I apprehend, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary

¹ 2 D. J. & S. 127.

² 6 Madd. 149.

³ 2 D. J. & S. 133.

accordingly." Then he goes into the case before Lord Eldon, and makes a special form of inquiry very much in the shape of the inquiry in the case before me.

Now, looking at those two decisions of Lord Justice Turner, there can be no doubt whatever as to his opinion that the tenant for life could properly cut that which the court itself would direct to be cut; that is, the court would not do anything wrong. The very notion of preserving ornamental timber was the creation of the Court of Equity; and, therefore, in directing some portions of the timber to be cut down to save the rest, the court was not contravening its own rules, but carrying them out, the intention of the testator being that, not all the ornamental timber, but as much of it as possible should be preserved, consistently with allowing the natural growth of the trees, and so far as they would not destroy one another. No Court of Equity or any other court could control the operations of nature, and therefore the court could not say that the whole of the ornamental timber should be preserved when the trees were growing so thickly as to destroy one another: but what it could do, and what it does do, is, to preserve it as far as possible.

If the tenant for life has done the same thing, and has only cut such of the ornamental trees as impeded the growth of the others, and such as were, as between the trees cut and those left standing, the most proper to be cut, how can I say he has acted unconscientiously or improperly? It seems to me I could not have granted an injunction against his doing this if he had shown that what he intended to do was exactly what he has done; and that being so he is entitled to the proceeds.

I wish to guard myself against it being supposed that if the remainder-man had come to the court before the tenant for life had cut any ornamental timber, I should not have granted an injunction. That raises a totally different question. Before the tenant for life cuts ornamental timber, it may be that the remainder-man has a right to the protection of the Court of Equity to prevent his doing it improperly. The tenant for life may say, I do not intend to cut anything but what can properly be cut; but the remainder-man can say, If you once cut down any of these ornamental trees I cannot put them up again: it may be an irremediable mischief: and, on the ground that the court interferes to prevent irremediable mischief, it may be that when a tenant for life begins to cut ornamental timber, the court will only allow him to cut under its direction and supervision, as in other cases of administration. It is not a question merely of his intending to do right; for, however good his intentions, the court would see, in carrying out the trusts of the will or settlement, that right was done.

I am not saying that I should not interfere with a tenant for life who

professed his intention of doing what was right, unless I was absolutely sure that he would do nothing else. I only say this because it might be thought, from the observations I have made, that the mere granting of the injunction would be a conclusive test as to his right to the proceeds. There may be cases where an injunction might be granted in which timber might be afterwards cut, and the tenant for life entitled to the proceeds even of timber so cut.

There will be a declaration that Sir John Sebright is entitled to retain the proceeds of the timber cut.

CHAPTER VI.

TRESPASS TO REAL ESTATE.¹

DORMER *v.* FORTESCUE.

IN CHANCERY, BEFORE LORD HARDWICKE, C., APRIL 28, 1744.

[*Reported in 3 Atkyns 124.*]

THIS cause came on again before the court upon the equity reserved.

Mr. Solicitor-General, counsel for the plaintiff, said, the question is, whether this court can decree the plaintiff an account of rents and profits from the time of his title accruing, which is from the death of his father, Eusebe Dormer, who died the 3d of September, 1729.

The plaintiff was obliged to come into this court, in order to have the family settlement produced at the trial at law, for the defendant wrongfully detained it, notwithstanding he had got all the four parts in his own hands, and pleaded himself a purchaser for a valuable consideration.

Lord Talbot, at the hearing, directed the deed to be produced at the trial at law, in order to determine the title there, and the bill to be retained for a twelvemonth, and a term for years to be removed out of the way, and all further directions to be reserved till after the trial.

The original bill, besides, prays general relief.

The plaintiff's title having been established at law, he is now entitled to a complete relief, an account of the rents and profits.

For if he has not the rents and profits as well as the estate, he has not complete justice done.

There are cases where at law a person may not recover rents and profits, and yet this court will direct it, where it has a proper jurisdiction, as in an action for rents and profits, which is in the nature of an action of trespass, if the person dies against whom it is brought, *moritur cum personâ*, but this court will direct an account of rents and profits notwithstanding.

It is said, that if the court decree an account of rents and profits, that it must begin only from the time of the supplemental bill.

¹ As to the jurisdiction of Equity over this class of cases on the principles of a bill of peace, see *supra*, Ch. II., p. 113.—ED.

But the court, wherever they decree it, do it from the time of the title's accruing.

There were no laches or neglect on the part of the plaintiff, for his father died the latter end of 1729, and the plaintiff brought his ejectments in 1731, and his original bill in 1732.

By the statute of Gloucester, damages in an assize are given, and after a trial in ejectment, there can be no other way of measuring the damages, but by rents and profits.

It was objected at a former hearing, that the statute of limitations has barred the plaintiff from carrying back the account any further than the filing the supplemental bill, six years having incurred before it was brought.

But when this matter came on, March 20, 1741, and the demurrer and plea was argued, this objection was overruled, and is now out of the question.

Lord Chancellor asked if the original bill charges the defendant, Mr. Justice Fortescue, to be in possession of the estate, for it is admitted that it does not pray specifically an account of rents and profits, but only general relief.

Mr. Solicitor-General. The bill indeed does not charge possession in the defendant, but it sets forth that the plaintiff has brought ejectments against him.

The cases cited by Mr. Solicitor-General and the rest of the counsel for the plaintiff, were *Coventry v. Hall*,¹ *The Duke of Bolton v. Deane*,² *Bennet v. Whitehead*.³

After they had finished, his Lordship adjourned the cause; and on the 2d of June, 1744, it came on again, when Mr. Attorney-General for the defendant said, that the avowed end of the original bill was not to try the right in a court of equity, for it does not pray possession, or the title-deeds to be delivered up, or the estate; neither does it ask an account of the rents and profits, nor charge the defendant with the receipt of them.

The decree of this court, and of all courts, must be *secundum allegata*, as well as *probata*.

The decree has been already made for all the purposes prayed by the original bill, namely, that the deed should be produced, and a term for years removed out of the way at the trial at law.

Where the right can only be determined at law, and the plaintiff cannot come here originally for the determination of the right, there is no instance where this court will decree an account of rents and profits.

¹ 2 Ch. Cas. 134; id. in 2 Rep. in Chan. 134.

² Prec. in Eq. 516.

³ 2 P. Wms. 644. 1 Vern. Anon. 105.

The plaintiff has gone altogether on the foundation of its being a legal right, states it so in his bill, and has not prayed the court to determine the right in any shape whatever.

The court cannot say now, that the final right to the inheritance is determined, for Mr. Justice Fortescue may, upon the new ejectment brought by him, recover it again; and therefore, if the court should decree an account of rent and profits, it would be decreeing at the same time, that the right is absolutely determined, and for this reason, while the ejectments are depending, this court cannot properly decree an account of rents and profits.

In the case of *Coventry v. Hall*, the court there decreed the rents and profits, because they had determined the right to be in the plaintiff, which differs it very much from the present case.

The plaintiff did not make an actual entry till October, 1736.

As the original bill did not extend to this, what they call a supplemental bill, is, to all intents and purposes, to be considered as an original bill; for where a party brings a supplemental bill, and prays a new relief, it must be taken as an original one.

That the court may as well decree a perpetual injunction, as decree the title-deeds, which the plaintiffs pray by their supplemental bill, to be delivered up to them.

Mr. Brown, of the same side, said, the plaintiff elected to try his title at law, and prays in this court a particular species of relief; the producing a deed in order to enable him to try it there, and when this was decreed here, they had given him all the relief he asked.

There was nothing pointed out in the bill, but only a defect and impediment to his trying the title at law; for the only thing which was pronounced by the decree, or could be decreed, was the producing the deed, and removing the term out of the way.

The deed being in Mr. Justice Fortescue's hands, is no reason why they should have an account of rents and profits here, for after the deed was produced, they might have recovered the rents and profits at law; for they are as much recoverable at law, as the title itself.

In the case of *Bennet v. Whitehead*, a person was prevented by fraud from receiving the rents and profits, which gave this court the proper and only jurisdiction, the defendant knowing them in that case to be only leasehold lands, as he had the very deeds in his hands, and yet sets up a right to them as freehold.

There is no pretence of any fraud here, for the plaintiff in his original bill has stated the whole title under the settlement, and therefore nothing was concealed from him, that was necessary for him to know.

Where once a person has made his election to proceed at law, he

must take his fate there;¹ and though there is a determination in favor of the plaintiff at law, yet a court of equity will not think this is a decisive determination, unless there is an application to the court, expressly to prevent the question from being litigated again, and for a perpetual injunction.

As there is a new ejectment brought, till a trial has been had upon it, it is doubtful, at least, whether the defendant may not recover the right again.

That the supplemental bill is not properly so; for it is a new relief which is prayed.

To say, that by praying general relief under the original bill, they are entitled to an account of rents and profits, would be carrying it too far, and attended with bad consequences; for it would be allowing parties to take the advantage of accidents, which have happened after a decree, and which could not possibly be foreseen at the time of bringing the bill.

They cannot, for the plaintiff, show, that this court will decree an account of rents and profits, where there is no trust standing in their way, or any ignorance of their title at law.

The ejectments were brought before the filing of the bill; and if they have been guilty of an error in bringing those ejectments, I do not know that this court sits here to relieve against the blunders of parties in ejectments.

They afterwards brought new ejectments, and recovered upon them; what hinders them then from bringing an action of trespass for the mesne profits? And it may be done with as much ease, and less expense, than an account taken before a Master.

As to the delivery of the deeds, your Lordship will not do it, as it will be laying the defendant under such difficulties as he can never get over, and will be equal in every respect to granting a perpetual injunction, and preventing him from ever trying the right again; and submitted, that the court ought to dismiss the bill entirely, as to the account of rents and profits.

Mr. Clerk, of the same side, cited the case of *Owen contra Aprice*.²

LORD CHANCELLOR. I am very well satisfied in my opinion upon this case; the general question is, whether the plaintiff is entitled to an account of the rents and profits, and if he is entitled to them, from what time?

The first divides itself into two considerations:

First, Whether on the foot of his general title the plaintiff has a right to an account of rents and profits from the time of his title's accruing?

¹ [3 Atkyns] 130.

² 1 Ch. Rep. 32.

Secondly, Whether in this court he has a right to demand them?

As to the first, nothing can be clearer both in law and equity, and from natural justice, than that from the death of his father, the time when his title accrued, he is entitled to the rents and profits.

There was a settlement made in 1662, for a valuable consideration, and the plaintiff claims under the uses of that settlement, by which he takes an estate-tail.

Mr. Justice Dormer, who died last, was tenant for 99 years, with remainder to his son in tail, which son died in the life of Mr. Justice Dormer, and on his death the plaintiff's father was entitled, and after his father died, the plaintiff himself.

From that time he had a right in equity and conscience, and if prevented from coming at it, it must be some impediment in law or equity that hinders him from receiving them.

It has been said, the defendants being in possession under a title, or such a title as they were mistaken in, that if they had taken the proper method they might have made it good; and that Mr. Justice Dormer and his son might have barred the estate-tail, either by getting the trustees to preserve contingent remainders to join with them, or by executing a feoffment upon the land, instead of a fine to make a tenant to the *præcipe*.

As to getting the trustees, or the heir to join, to make a tenant to the *præcipe*, that is a very uncertain thing, for I believe trustees to preserve contingent remainders would have been extremely cautious in consenting, as there was no marriage settlement on foot, as a plausible pretence for declaring new uses, different from those under the settlement.

As to the other way, I lay no weight upon that, for it is only saying they might have done it by another method, which the law calls a wrong; such a feoffment as that would have had its effect, and could only operate as a disseisin, and would have gained a freehold by wrong, and that might have made a tenant to the *præcipe*; but no presumption of favor arises from thence, for it is a wrong at least, however it might have substantiated the title at law.

The plaintiff therefore certainly was entitled to the rents, from the accrual of his title.

The next branch of the case is more material, which is, whether the plaintiff has a right to demand an account of the rents and profits in this court; and I am of opinion, under the circumstances of this case, he has a right to come into this court for that purpose.

There are several cases where the court will do it, and several to be sure where they will not; but I can by no means admit the latitude in the Anon. case in 1 Vern. 105, or rather in that note of a case.

For if a man brings an ejectment bill for possession, and an account of rents and profits, where there is no mixture of equity, the court will oblige the plaintiff to make his election to proceed here, or at law, and if at law he must proceed for the whole there: that case might very possibly be a bill brought by a *prochein amy* for an infant, or attended with some special circumstances omitted by the reporter: if it was the bill of an infant, who has a right to come here, the court might elect him to proceed at law, and retain the bill for the mesne profits.

But as I said before, there are several cases where this court does decree an account of rents and profits, and that from the time the title accrued.

As where a man brings his bill in this court, where there is a trust, and upon a mere equitable title, there he shall recover the estate, and the court will give him an account of the rents and profits, and that from the time the title accrued, unless upon special circumstances, and then they will restrain it to the time of bringing the bill; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared, or where the title of the plaintiff appeared by deeds in a stranger's custody.

So where there hath been any default or laches in the plaintiff, in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill.

So in the case of a bill brought by an infant to have possession of the estate, and an account of rents and profits, the court will decree an account from the time of the infant's title accrued, for every person who enters on the estate of an infant, enters as a guardian or bailiff for the infant.

There are other cases where the court will do it merely upon a legal title, as wherever the plaintiff has been kept out of it by fraud, misrepresentation, or concealment of the defendant.

So in the case of dower, if a widow is entitled to dower, and her claim is merely upon her legal title, but cannot ascertain the lands out of which she is dowable, this court will assist her to find out the lands, and the court will order her to proceed upon a particular part, and reserve the further consideration till after judgment, and if her title of dower is established, will give her profits from the time not only of her demanding, which is the time she is to have it in her writ of dower, but will give it her from the time of her title accrued, though the statute of the 9 Hen. 3, ch. 1, gives her damages only from her demand.

I will put this case; suppose a widow entitled to dower of an estate.

upon which a term for years was standing out, and she had her title of dower out of the reversion of the term, and she comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time of her title accrued, and will set the term as a satisfied one out of the way; but if that term had been out of the way, and she had no need to come into this court, it would have been otherwise.

Then consider how far the present comes up to this case; it appears that the settlement under which the plaintiff's title arose was in the hands of the defendants, and detained by them, though I do not say it was fraudulently obtained, but still the plaintiff could not come at it without the assistance of this court. The plaintiff, it is true, brought his ejectment before he brought his bill here, and from hence the defendant's counsel have inferred that he knew his title; but how did he know it? why, only by guess, for it is plain that the plaintiff did not so much as know there was this 200 years' term standing out, for the deed by which it was created, is not so much as mentioned in the bill, and he only knew it by its being read in the cause.

This is one reason which weighs with me.

There is another ground still remaining, and a stronger one, that I think this to all material purposes an equitable title: here is a term created of 200 years by the settlement, the legal estate was in trustees, and the term was appointed likewise to be attendant on the inheritance, so that it was a plain bar in the plaintiff's way at law; and he having then brought his ejectment at random, Lord Talbot ordered the bill to be retained for a twelvemonth, that he might, if he pleased, bring a new ejectment.

Besides, if the plaintiff had known anything of this trust term, he would certainly have made the trustees parties to the suit, that they might convey to him, if he should eventually appear to have the remainder in the inheritance.

But notwithstanding this court has undoubtedly a jurisdiction with regard to decreeing rents and profits, yet if the plaintiff has not taken a proper remedy, or proceeded in a proper method to have an account, he cannot be entitled; and whether he is or not, will depend upon two things:

First, As to the nature of the original bill.

Secondly, Upon the supplemental bill.

As to the first, it has been insisted for the defendants, that it is brought for another purpose, *diverso intuitu*, and is confined merely to the discovery of the settlement, and for producing the deed on the trial at law.

To be sure, if the plaintiff has not made such a case by his bill as

will entitle him to an account of rents and profits, it is rightly said, that his praying general relief will not entitle him; though Mr. Dobbins, a counsel formerly in this court, used to say, that praying general relief, was the next best prayer to the Lord's prayer.

The bill then, no doubt, is inartificially and defectively drawn, for want of so full a charge as might have been laid of the possession in the defendant: but then the plaintiff has charged that he has brought ejectments against the defendants for this estate, which is tantamount to charging possession. And the defendant, Mr. Justice Fortescue, actually by his answer admits himself in possession.

Where the defendant's counsel would confine the general relief, prayed by the original bill, to the producing the deed at the trial, they are mistaken in the nature of the bill, for the bill desires not only that the deed may be produced at the trial, but delivered up for the benefit of the plaintiff; and what puts it out of all doubt, is, that here is likewise an affidavit annexed of the want of the deed, which makes it a very strong case for the plaintiff, because the annexing an affidavit is, where the plaintiff has an intention to change the jurisdiction from a court of law to a court of equity; and if the bill was merely for a discovery of a deed, or for producing it at law, no affidavit is necessary; and this is the constant distinction.

And as this appears to be the nature of the bill; so I think my Lord Talbot understood it in this light; and if the trustees had been parties to it, the court might have decreed possession, and a conveyance of the trust estate, if they thought it a clear point for the plaintiff, or might do as Lord Talbot has done, direct a trial at law when it is doubtful.

Here his Lordship has likewise decreed the deed to be produced at the trial at law, and that the term for 200 years should not stand in the way, and reserved all further considerations.

It is all one as to the jurisdiction of the court, whether they make use of one mode of expression in drawing up their decrees, or another, or whether they direct the parties to proceed in the ejectment, or a trial at law: but if the very trustees of this term had been before the court, I would not have directed an assignment of this trust, till the point in relation to the title had been first determined.

I am of opinion that the original bill extends to everything which is now insisted on by the plaintiff, and that I ought not to confine it to the single matter of producing the deeds at the trial; and that in the first place, the court under this will may very properly give directions as to the disposition of the title-deeds.

But suppose the original bill to be as defective as the defendant's counsel would have it, could anything be more proper than to bring

a supplemental bill, to put this matter in issue, and to supply the defects if any in the original bill.

Supplemental bills are often brought even in aid of a decree of this court, as in a decree to account for want of full direction before; and directions are given under the supplemental bill that the new matter should be connected with the former decree.

If the plaintiff's original bill had not prayed this general relief, it was very proper to bring a supplemental bill that he may have an entire relief; and I think that they ought to be considered as one bill, and connected together.

All the cases which are material have been cited; the first case was that of *Coventry v. Hall*,¹ or *Hill*, which was only a questionable title where a recovery could not be had at law.

The case of the Duke of Bolton *v. Deane*, is merely a title at law, and therefore applicable to the present point, for I do not know that the Duke of Bolton could be said to be out of possession; for where the tenant held over after his term expired, he was by sufferance only, and therefore his possession was the Duke of Bolton's possession;² this was as strong a case to leave it to law as could be, and yet the court decreed under that bill an account of rents and profits.

*Bennet v. Whitehead*³ is a much stronger case, and more similar to the present; I was of counsel in it myself, and as it is in the book and also upon memory, it was a mere legal title, and there the deeds were in the custody of the plaintiff himself, here in the defendant's hands, and therefore this is a stronger case.

Still it is objected that where a man is *bona fide* possessor, he shall not account according to the rule of the civil law; and the rule of this court, and the civil law, is stronger in this respect than the law of England.

But where a man shall be said to be *bona fide* possessor, is, where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title: which could not be here, for Mr. Justice Fortescue had all the deeds, and the very settlement itself on which the title depended.

Another objection has been made, that though the plaintiff has obtained a verdict at law, this is not a final determination of the parties' right, and therefore the court ought not to decree an account of rents and profits, because a new ejectment is now depending, and the defendants may possibly recover the estate back again.

This would narrow the jurisdiction of the court too much.

There are instances where upon a mere legal title the court have

¹ 2 Cha. Rep. 259, S. C.

² Har. Co. Litt. 330, b, note 1, Cowp. 703.

³ 2 P. W. 644, S. C.

decreed an account of rents and profits, as in the case of an infant who brings a bill for possession, and for an account of rents and profits, and yet they do not decree a perpetual injunction, though they decree an account of rents, etc.

Suppose an heir at law brings a bill for discovery of deeds and writings, and for the mesne profits, and the court decree him the deed, etc., yet if the defendant should afterwards at law make out a better right than he did here, this court would not disturb him in it, but assist him in recovering the deeds back again.

If I was to delay decreeing the account of rents and profits now, it would be attended with infinite inconvenience, and therefore I am of opinion that the plaintiff is entitled to an account of the rents and profits from the time of the plaintiff's title accruing, which is from the death of his father in 1729.

And as to the deeds and writings let them be brought before the Master, upon oath, and as to the disposition of them, I shall reserve the consideration of that till the final right to the inheritance is determined.

The opinion of the Judges in the House of Lords, in the case of *Dormer v. Fortescue*, as delivered by Lord Chief Justice Willes, I apprehend will not be unacceptable, and therefore venture to give it to the public, and hope in such a manner as not to do any injury to the memory of that very learned and able judge.

MOGG v. MOGG.

IN CHANCERY, BEFORE LORD THURLOW, C., MARCH 13, 1786.

[*Reported in Dickens 670.*]

THE plaintiff was a trustee of certain estates, and in whom the legal estate was vested: The defendant hath not any right, but persuaded the tenants to cut down timber.

Bill for an injunction to stay waste; and this day the plaintiff moved for an injunction accordingly, upon filing the bill: It was mentioned on the 11th, but the Lord Chancellor desired Mr. Madocks to see, if he could find an instance, where a stranger comes upon lands as a trespasser, and cuts down timber, or commits waste, in which this court hath granted an injunction to stay him, saying he was liable to an action by which he might be stayed.

On this day, the 13th, Mr. Madocks said he had recollected a case before Lord Camden, C., in which the plaintiff was lord of a manor in Oxfordshire, upon which the defendants claimed a right to esto-

vers, and under that right, they cut down timber in one day to the value of £400; the plaintiff filed his bill for an injunction to stay waste, and obtained one; upon its being served, their attorney advised the defendants to desist from cutting down any more timber, but advised other tenants of the manor to cut down timber; upon which Lord Camden granted an injunction to stay waste, against persons not parties, and Mr. Madocks argued this as a case in point.

The Lord Chancellor said it did not apply, for in that case there was a right to something in the defendants, though perhaps they carried it beyond what such right went to; and that until such right was determined, it was very proper to stay them from doing an act, which if it turned out they had no right to do, would be irreparable: but in the present case the defendant had no interest; he was a mere trespasser, and being such, an action of trespass would lie against him; and therefore his Lordship would not grant the motion.

MORTIMER v. COTTRELL.

IN CHANCERY, BEFORE LORD THURLOW, C., DECEMBER 16, 1789.

[*Reported in 2 Cox 205.*]

THE defendant had for some time acted under a power from the plaintiff as the receiver of several rents of houses belonging to the plaintiff, and had also been authorized by the plaintiff to dig earth in an adjoining brick-field to a certain depth from the surface. The defendant having dug beyond the limit, the plaintiff revoked all powers of attorney made to the defendant, and required him to desist from digging any further; but the defendant continuing to dig, the plaintiff filed this bill, praying that the defendant might be restrained by injunction from digging further on the premises. And the Solicitor-General now moved for an injunction on certificate of the bill filed and affidavit of the fact, and urged that as this ground was intended for building, and as it would be rendered unfit for the foundation of a house if the ground was dug deeper from the surface than the limited depth, this was one of that species of irreparable mischief which this court would prevent by injunction.

But the Lord Chancellor said, the defendant was a mere stranger; that he had been guilty of a forcible entry, and that there was no case where this court would interfere by injunction, when the party was a mere stranger, and might be turned out of possession immediately.

PULTENEY v. WARREN.

IN CHANCERY, BEFORE LORD ELDON, C., APRIL 22, 24, AND
MAY 11, 1801.

[*Reported in 6 Vesey 73.*]

THIS cause arose in consequence of the final decision of the causes of *Lady Cavan v. Pulteney*, and *Lord Darlington v. Pulteney*,¹ concerning the validity of the leases granted by the late General Pulteney of several houses in Sackville Street, Piccadilly. The result of those suits being against the leases, this bill was filed against the executors of the late Dr. Warren, one of the tenants, for an account of the mesne profits in respect of the house occupied by him from July, 1791, when the possession was required by the plaintiff, to July, 1797.

The circumstances and dates were these. Upon the 2d of July, 1790, Dr. Warren and the other tenants received notices to quit. Upon the 5th of July, 1791, a formal demand to quit was served upon them. In Trinity Term 1791 an ejectment was brought in the Court of King's Bench by Sir William Pulteney against Spottiswood, an under-tenant of Lady Cavan, one of the lessees; who by a rule of the court was admitted to defend the action in the room of Spottiswood. The demise in that ejectment was dated the 6th of July. Issue was joined upon a plea of the general issue; and at the trial after Michaelmas Term 1791, a special verdict was found; which was argued in Easter Term 1794; and a final judgment was obtained by the plaintiff upon the 24th of May, 1794. Soon afterwards Lady Cavan sued out a writ of error returnable in the House of Lords. In Easter Term 1794 other ejectments were brought by Sir William Pulteney against Dr. Warren and all the other occupiers; who pleaded the general issue; and in Trinity Term following upon their application to the Court of King's Bench an order was made in each of these actions, that the proceedings should be staid; the defendants undertaking to abide the event of the special verdict in the cause against Lady Cavan, and not to bring any writ of error for delay. Upon the 7th of May, 1795, the judgment obtained against Lady Cavan was affirmed in the House of Lords. The bill of Lady Cavan, Dr. Warren, and the other tenants, was then filed; and the bill of Lord Darlington; and upon the 1st of May, 1795, the order for the injunction was obtained in those causes; with liberty to move to dissolve it, in case the plaintiffs should not set down their causes for

¹ [2 Vesey] 544; [3 Vesey] 384.

hearing in Michaelmas Term ensuing. Under that order the injunction issued upon the 29th of July; and, the causes not being set down pursuant to the order, a motion to dissolve the injunction was made in Michaelmas Term 1795. That motion was refused. Upon the 3d of June, 1797, Lord Darlington's bill was dismissed; and upon the 3d and 19th of June the order was made in the other cause, retaining the bill for twelve months; the plaintiffs to be at liberty to bring actions in consequence of their eviction; and an inquiry was directed, how the assets of General Pulteney were disposed of; and the injunction was dissolved. Upon the 16th of December, 1797, the minutes of that order were varied by inserting a direction, that the plaintiffs should not take out execution in those actions till farther order. Upon the 17th of June, 1797, Sir William Pulteney moved the Court of King's Bench for leave to enter up judgment against Dr. Warren; which was ordered in Trinity Term. Upon the 22d of June, 1797, Dr. Warren died. Upon the 19th of July following possession was delivered by his executors.

The bill represented, that the plaintiff was prevented by the order made by the Court of King's Bench for staying the proceedings from entering up judgment against Dr. Warren; and that before the necessary application could be made to that court for leave to enter up judgment, the bill was filed by the tenants; upon which the injunction was obtained.

The defendants by their answer insisted, that they ought not to account for the mesne profits demanded by the plaintiff; the same not being recoverable at law or in equity; and suggested, that the plaintiff stood by; and allowed Dr. Warren to lay out considerable sums in improvements. They also filed a bill against Sir William Pulteney: praying a discovery as to that among other things; and whether Sir William Pulteney did not know previously, that the lease was void. The answer to that bill stated, that most of the expensive alterations were made before the decision of the point; that the defendant never concealed, but avowed, his intention to break the lease, if he could; that he did not know, in 1794 or 1796, that Dr. Warren had laid out large sums; and that the estate was managed by his agent.

A treaty had been entered into for ascertaining the mesne profits, and making an allowance in respect of the improvements: but they could not agree.

Mr. Alexander, Mr. Romilly, and Mr. Dowdeswell for the plaintiff.

Mr. Mansfield and Mr. Fonblanque for the defendants.

LORD CHANCELLOR stating the case, and observing, that the Court

of King's Bench in making the rule for staying the proceedings in the several actions of ejectment for some reason, not apparent, and perhaps, because they might think, there was a question fit to be agitated in equity, did not add as a term, that the defendants should bring no suit in equity, and that it was clear, that, if there is any mode of recovery at law, it cannot be by an action of trespass for mesne profits, delivered his judgment.

The plaintiff insists, that he has a remedy for these mesne profits in equity; more especially as he was by the act of the Court of King's Bench and the subsequent act of this court upon the application of Dr. Warren, restrained from proceeding during his life; and that the plaintiff ought not to be injured by the consequences of that act, preventing him from pursuing his legal remedy. In the argument at the bar it was considered, 1st, With regard to the claim, in case the plaintiff had not been restrained from proceeding by the acts of Dr. Warren in the Court of King's Bench and in this court; and it was said, that, though it is true, a personal action dies with the person as to the injury committed in the fact constituting the cause of that action, yet if the personal injury has been committed with a profit to the party doing that injury there is both in law and equity a remedy sufficient to extract out of his pocket that profit, which he has reaped by his injurious act, and, that this bill may be sustained upon the general ground. It was argued, that this is a principle, which may be demonstrated by the reasoning in *Hambly v. Trott*, as far as the doctrine of law is to be looked to; and it is said very truly, that all natural justice is with the plaintiff; who is now clearly to be taken to be entitled both in law and equity to the possession from the moment he made the demand; and if so, the mesne profits are consequential upon his obtaining possession; and therefore it is at least according to natural justice, that he should now be placed in the same situation, as if there had not been an adverse possession at law against him and these adverse proceedings in equity. It was further insisted, that merely from the circumstance of his having brought action of ejectment, which action is founded in trespass, he cannot now maintain, upon *Hambly v. Trott* and other cases, at least for the mesne profits accrued since the ejectment, an action for use and occupation. With regard to that *Birch v. Wright* was cited. All, which that case decides, is, that in the ordinary case of a tenant, if you bring an ejectment, you cannot afterwards bring an action for use and occupation for the rent subsequent to the demise; because, having treated his holding as founded in trespass you shall not treat it as founded in contract. That case establishes this distinction; that that rule will not apply to the time previous to the ejectment. Therefore, if

that doctrine is to be applied to this case, that authority does not preclude the plaintiff from trying, what he can make of the action for use and occupation for the time between 1791 and 1794; though it would preclude him from the time of bringing the ejectment down to the recovery under it. If I was satisfied, I ought not to interpose upon the special grounds in this case, I should yield so far to the argument for the plaintiff as to that, that, finding it admitted, as it must be, that this is an application new, as far as it stands upon general principles, if it could be maintained, that an action for use and occupation would lie, that action being founded upon contract, it would follow, that they might be considered as indebted to him, and he might have a remedy against the assets. But I feel so much doubt upon that point, whether an action for use and occupation could be maintained, that I should not think myself authorized to make the decree upon the ground, that could maintain that action, without first permitting an action to be brought upon the terms of not setting up the ejectment, the statute of limitations, or any other legal bar, against that action; but that it should be considered simply upon the plaintiff's title, as it stood in 1791, without embarrassment from the subsequent proceedings. The difficulty I have in supposing, that action could be maintained, turns upon this; that these parties claim under a title neither adverse, nor altogether otherwise. Taking it to be adverse, as tenants claiming under a lease, which is contended to be effectual to bind the plaintiff, that lease determines the terms of their holding; and the recovery must be upon the foot of those terms. If they do not hold under that lease, they are not in the same relation to the plaintiff as the tenant stood in *Birch v. Wright*; for he had the character of tenant: but if you say, the lease was not binding upon the plaintiff, you destroy the relation of landlord and tenant; and then there is an adverse title; and it is difficult to say, they hold under that contract; which is the foundation of the action for use and occupation.

If it cannot be put upon that ground, or if it is not thought prudent so to put it, the next question is, if in no form of action, that can be devised, this question can be tried at law, has the court upon the general case, without adverting to the circumstances of this case, a jurisdiction to say, these executors shall account for the mesne rents and profits? To put that question correctly, I must for the present lay out of the case the fact, that Dr. Warren was with a variety of other persons a defendant in a court of law, and a complainant with those persons in this court; and I must look at him as being alone and individually a defendant in an ejectment; under which the plaintiff has not been able to obtain possession, until it happened, that by

the accident, as it is called, of his death the plaintiff cannot proceed in an action for mesne profits. I agree, it is impossible to consider the mere circumstance of his death as that species of accident, against which this court would relieve. It is admitted, this case is new in its kind. It is contended, however, that the demand upon the general principle can be supported by analogy to other cases. Upon the best consideration on that head they have not been able to state any case, strictly speaking, analogous. I feel very strongly, that this claim is founded in natural and moral justice; and if it could be sustained upon the general principle, the court would be very strongly inclined to support it: but if it is to be determined upon the general principle, it must be decisively put upon that ground, and not upon an analogy, which will not hold. With respect to the analogy, the bills by infants have gone upon the ground of infancy, and the character, in which the other party was considered to stand, as a bailiff or receiver. As to the case of the heir, without going through *Dormer v. Fortescue*, and the other cases which were all discussed in *Pincke v. Thornycroft*,¹ I do not know a case, in which the heir has claimed merely as heir an account, not stating any impediment to his recovering at law; that the defendant has the title-deeds necessary to maintain his title; that terms are in the way of his recovery at law; or other legal impediments, which do, or which may probably, prevent it; upon which probability or upon the fact the court founds its jurisdiction.

The case of the dowress is upon a principle, somewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her case upon the great difficulty of determining, *a priori*, whether she could recover at law, ignorant of all the circumstances; and the person, against whom she seeks relief, as was strongly observed by the Master of the Rolls in *Curtis v. Curtis*, having in his possession all the information necessary to enable her to establish her rights. Therefore it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed.

The case of mines is very different upon another ground. There the bill will originally lie against the party himself: if not, I do not know, that originally it could be brought against the personal representative. The case of timber is also upon a very different principle. Lord Hardwicke says the case of the mines is in the nature of a trade; and as to the timber, the equitable jurisdiction is put by him upon this, to prevent a multiplicity of suits; and the court having jurisdiction with regard to the waste takes the whole together: but he

¹ 1 Bro. C. C. 289.

states expressly, that if there is not a ground for an injunction to restrain waste, the party must go to law.

The case of tithes is also very different. When severed they belong to the tithe-owner. It is an acquisition of property, as stated in *Hambly v. Trott*, put into the possession of a party; who ought to give it to another.

Upon The Bishop of Winchester *v. Knight* therefore and all these cases, there must be either a difficulty to recover at law, or fraud, concealment, etc., which enables the party to say otherwise than that if he had gone to law he would have recovered. There is therefore no analogy arising from these cases. If I was obliged to decide, whether this claim could be supported upon the general principle, I should wish to hear the case further argued, before I should venture to introduce a new decision upon this subject. But I am relieved from that by the special circumstances of this case; which make it unnecessary to decide upon the general principle. The plaintiff must now be taken in this court to have had a clear legal right to the possession as early as 1791. In that year he brings an ejectment against one occupier. The bill does not inform me, why he abstained from bringing ejectments against the others till 1794. In that year he brought ejectments against all the tenants; and then they in a mass feel the justice of his acting against one only; and they make an application, a very proper application, to the Court of King's Bench to restrain him from proceeding against them upon this ground, distinctly stated, that they hold by the same title as Lady Cavan; and that it was equitable, that action should decide the question between the plaintiff and all of them; praying, that the plaintiff should not be at liberty to proceed one step farther against them; undertaking, that the recovery against Lady Cavan should bind them, as far as the law was to deal between them; asserting therefore, that the plaintiff acted with great propriety in forbearing to bring actions against them till 1794. In law therefore they identify their case with Lady Cavan's. It was not adverted to in the Court of King's Bench, that there was a manifest call of justice upon them to have done more; and I am entitled to say so upon their ordinary practice; taking care, that inquiries shall not prejudice the ultimate rights of parties by the effect of their rules, operating as injunctions. If a verdict had been obtained in an action for damages, which that court might think excessive, they would hardly grant a new trial without taking care, that the plaintiff in the interim should not lose all benefit of the verdict by the death of the defendant. I allude now to the rule with great propriety adopted in the case of *Lord Dorchester*¹ and a gentle-

¹ *Pleydell v. The Earl of Dorchester*, 7 Term Rep. B. R. 529.

man in the west of England. It would have been perfectly just in this case to have said, the defendants should put the plaintiff in the situation, in which he would have been, if they had not interposed. That, however, was not added. I do not stay to examine, whether it was necessary, that the judgment in the ejectment should precede the action for mesne profits: but if it was necessary, the plaintiff could not avail himself of the judgment, affirmed in 1795, on account of the bill filed in this court; insisting, that notwithstanding the recovery at law still it was against conscience, that the plaintiff should have the possession on account of the circumstances, making it equitable, that he should not avail himself of his legal rights. Upon that ground the injunction was obtained. If that injunction was not capable of being maintained at the hearing, and it was not suggested to the court to provide against accident as to the mesne profits, I cannot agree, that it is the plaintiff's fault; because he does not ask enough. It is the duty of the counsel to inform the court; and if they do not, and the court happens not to have acted upon its information up to the point, which it ought to have reached, it is bound to relieve the party, as far as it can, from the injustice, to which the shortness of its proceedings may have exposed them. If upon the application for the injunction the question had been put, whether the court would expose the defendant in that cause to the hazard of losing the rents and profits of the premises by the death or insolvency of the plaintiffs, and the court had been reminded of the justice due to the defendant in its full extent, it is impossible that injunction should have been granted without the terms, that a fair rent for the premises should be brought into court from time to time, that the court might be in possession of a fund, that would enable it to do justice, whatever accident might happen during the time necessary for the consideration of the question, whether he, who had recovered at law, could sustain the benefit of that judgment.

It has been said by Mr. Fonblanque, the action for mesne profits may be maintained, though no judgment has been obtained in ejectment. I will not trust myself with the decision of that question in this cause. In *Norton v. Frecker*¹ Lord Hardwicke says, trespass will not lie for mesne profits, till the possession is recovered by ejectment. I will not say, there can be no action, founded upon the old learning: but under these circumstances I am not bound to determine that; for, if in the ordinary action for mesne profits the plaintiff might have recovered what he now seeks in equity, and if under the circumstances of this case he has been restrained from proceeding in that action, and all conscientious views of the case require me to say,

¹ 1 Atk. 524.

he would have been restrained in any other action from receiving them, it would be very hard, that, because he did not make the experiment, whether that other species of action could be maintained, the court will give him no relief. If there be a principle, upon which courts of justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases. The case, in which the court would not relieve, though the interest went beyond the penalty of a bond, still strikes me as a very strong case. If the plaintiff submitted to nothing, by the mere circumstance of filing the bill he would be taken to submit to everything conscience and justice require. Upon that principle he would be held to do that, which is just; and the court duly acting with him would compel him to pay the principal, interest and costs, occasioned by his delay. It may be said, that is a relief given against a plaintiff, coming for relief. I consider these persons as plaintiffs, asking an injunction, and impliedly saying, they ask it upon the terms of putting this plaintiff in exactly the same situation, as if it had been determined, they were not entitled; for otherwise there is no color of justice calling upon the court to discuss the question, whether they are entitled to equitable relief. The case of a *remanet at nisi prius* was put. If the application is founded in fraud, or concealment, or misrepresentation, I am not prepared to say, a court of equity might not find the means of relief in that sort of case; but it is very different, where the party applies, not upon his notion of what the law is, but upon the fact; to the existence of which he does not administer by his conduct. Upon that it seems there can be no relief in equity; for it is not the act of the parties; but a necessity arising out of the act of third persons, affecting their rights; not done at the instance of either of them: the occasion not furnished by their acts. The case was also put of a creditor prevented from obtaining judgment by the act of this court; and the question, whether he ought to be considered as a judgment creditor. I will not say, what the answer might be to the case, put so generally. A court of law always takes care, that a creditor so prevented shall be put in the same situation, as if he had his judgment, and no such application had been made; and I rather think, in every instance of an application for an injunction it is the duty of the court to consider, whether the party ought not to have the benefit of his judgment; and if the court decides wrong, I should be sorry, if the court had not the means of reinstating him.

The ground, therefore, upon which this case is decided, is, that the *res gestae* show, that Dr. Warren has amalgamated and mixed himself

with the other tenants. The equity as to all of them arises from their joint act, operating to prevent the plaintiff from having that redress at law, which in all moral probability he would have had, if this court had not interfered; and which in all moral justice he ought to have had. I had considerable doubt, how far back the account ought to go. It ought to go back, as far as natural justice requires. Where there has been an adverse possession, and upon an application to this court upon grounds of equitable relief the plaintiff appears entitled to an account of the rents and profits, if there has been a mere adverse possession, without fraud, concealment, or an adverse possession of some instrument, without which the plaintiff could not proceed, the court has said, the account shall be taken only from the time of filing the bill; for it is his own fault not to file it sooner. But the question here is, not, what relief is due to the plaintiff with regard to the period, at which this bill was filed, but attending to the circumstances stated by this bill, forming the facts of the prior causes in this court. Attending to those circumstances, the question is, if it had not been for what passed in those prior causes, would not this plaintiff have recovered from 1791: and do not the circumstances of those causes demonstrate, that he was substantially and in conscience proceeding adversely from that period, until he was restrained from farther proceedings; giving notice to quit; and making a formal demand of the possession; abstaining, as, they say themselves, it was fit he should abstain forever, from bringing any other action except that against Lady Cavan. He has therefore demanded the rents and profits from 1791 down to the decree in the other causes. If he had brought an action for mesne profits, as soon as he could upon the ejection, the production of the record would have entitled him from the day of the demise. But it is equally clear on the other hand, that would not necessarily have prevented him from recovering from the time his title accrued; provided he gave them an opportunity of questioning that title; for I take it to be clear, he is not bound to demand no more than from the day of the demise. He may, if he pleases to put the title in hazard, insist upon the mesne profits from the time the title accrued; saving only the benefit of the statute of limitations: but then he must prove his title. He would therefore have been entitled to the rents and profits from 1791. If so, upon what ground is he not entitled in equity from the same period?

The decree must therefore be according to the prayer of the bill. As to the mode of estimating the mesne profits, it will be better, that they should settle that among themselves.

PILLSWORTH v. HOPTON.

IN CHANCERY, BEFORE LORD ELDON, C., MAY 6, 1801.

[Reported in 6 *Vesey* 51.]

Mr. Thomson, for the plaintiff, moved for an injunction to restrain the defendant from committing waste. The defendant was in possession: the tenants had attorned; and the plaintiff having brought an ejectment, had failed in it; but, as the bill alleged, not upon the merits.

LORD CHANCELLOR. I do not recollect, that the court has ever granted an injunction against waste under any such circumstances: the defendant in possession; the tenants having attorned: the plaintiff having failed in his ejectment: both setting up pretences of title. I remember perfectly being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating, that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.

His Lordship having inquired, if the bar knew any instance, and none being produced, would not make the order.

MITCHELL v. DORS.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 23, 1801.

[Reported in 6 *Vesey* 147.]

Mr. Mansfield and *Mr. Bell* moved for an injunction against the defendant; who having begun to get coal in his own ground had worked into that of the plaintiff.

LORD CHANCELLOR. That is trespass, not waste. But I will grant the injunction upon the authority of a case before Lord Thurlow:¹ a person, landlord of two closes, had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised; and the difficulty was, whether the injunction should go as to both; and it was ordered as to both.

The order was made.

¹ Flamang's Case, cited by the Lord Chancellor in *Hanson v. Gardner*, *infra*, p 545.—ED.

HANSON *v.* GARDINER.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 15, 1802

[Reported in *7 Vesey* 305.]

THE Attorney-General and Sir Thomas Turton, for the plaintiff, showed cause against dissolving the injunction upon the answer put in. The prayer of the bill was for an injunction against cutting down timber or wood in a wood or coppice, consisting of above 130 acres, within the manor of Bromley, and depasturing cattle therein. The injunction was granted by the Master of the Rolls upon affidavits. The plaintiff represented himself as seised in fee of this wood and coppice; which were formerly inclosed; but that some time ago the inclosure was thrown down; and considerable damage done to him by the cattle of the commoners trespassing thereon. The defendants contended, that the plaintiff was not seised in fee. The plaintiff farther insisted upon his right as lord of the manor under the Statute of Merton.¹ The defendants stated, that there are large patches of pasture within the wood; upon which they claimed as commoners a right of pasture; and that after this inclosure there would not be sufficient common of pasture. They also claimed common of estovers; and denied, that the wood and coppice were ever inclosed. They stated various encroachments by the plaintiff; that for some time they acquiesced: but, finding his encroachments increase, they at length resisted; which produced an action of trespass by the plaintiff; which was tried at the summer Assizes, 1801; and the plaintiff was nonsuited. He afterwards, having permitted the enjoyment for some time, gave notice that he would inclose under the statute² of Geo. II. The inclosure was ordered at the sessions under an agreement with some of the commoners: but the defendants appealed; and that order was quashed.

Mr. Mansfield and Mr. Pemberton for the defendants.

LORD CHANCELLOR. This bill for an injunction is not like a bill between lord and tenant, praying the establishment of rights, and an injunction till, or at, the hearing, as auxiliary to the rights: this bill not stating the relation between the plaintiff and the tenants; but simply praying an injunction. The law as to injunctions has changed very much; and lately they have been granted much more liberally than formerly they were. Formerly, when legal rights were set up to the extent, in which they are set up in this case, the court were very tender in granting injunctions. I remember, when in a case of trespass, unless it grew to a nuisance, an injunction would have been re-

¹ Stat. 20 Hen. III., c. 4.

² Stat. 29 Geo. II., c. 36.

fused; and even in the case of waste, if by temporary acts, from time to time merely, the subject of an action, and not bringing along with it irreparable mischief, Lord Hardwicke thought, it was granted only as following the relief. Lord Thurlow had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was Flamang. There was a demise of close A to a tenant for life; the lessor being landlord of an adjoining close B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of the working in the former close, Lord Thurlow hesitated much; but did at last grant the injunction: first from the irreparable ruin of the property, as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining in matter of trespass, where irreparable damage is the consequence.

This led to *Robinson v. Lord Byron*¹ and the other cases; in which also this principle operated; that unless there was some jurisdiction to prevent it, there would be a great failure of justice in the country. The ground of that case was irreparable mischief; and irreparable mischief, that would have been done, before there could have been any trial at law as to the right claimed to let off the water. *Isaac v. Humpage*² is a case upon its own particular circumstances; certainly not standing upon the motion of irreparable waste. Mr. Justice Buller put it upon fraud. It does not appear exactly how he applied that to the case: but it certainly is not at all connected with what is here stated. If this is to be considered upon trespass alone, an injunction would not be granted, merely because asked for, without stating distinctly that it was upon trespass alone. If it is not to be so considered, then it is a bill brought by the lord of the manor; which must be taken to admit, either, that there are rights of common of pasture and estovers, or, that it may so turn out; insisting against those rights upon an inclosure made under the Statute of Merton or other authority. It is difficult to state, what he is to say as to common of estovers: this case stating, that he has a right to preclude them from ingress, etc.; denying therefore their right to estovers. After the cases cited from Vernon, I am not disposed to say, the lord may not file a bill; stating, that he has approved under the statute; and left sufficient common of pasture; and by the operation of the statute the inclosure is become his exclusive soil, etc.; and to say, that a bill will not lie, to avoid multiplicity of suits, not in the nature of waste. But the material question is, what the prayer ought to be, whether merely for an injunction, or for the establishment of his ex-

¹ 1 Bro. C. C. 588.
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² 23 Bro. C. C. 463.

clusive right under the statute, and to have that right declared. I never heard, that a mere bill for an injunction would have the effect of a bill for establishing the right against all others; and then it stands upon a different principle. In those cases the court would have done a very strong thing in restraining even common of pasture till the trial unless upon strong, probable, and pregnant evidence, that the commoners would not suffer in the meantime; and that the event would in all probability be, that there was sufficient common of pasture left. Of that there must have been evidence far beyond what there is here.

As to the common of estovers, the affidavits hardly verify one fact. An injunction cannot be had upon the mere apprehension, that the defendants mean to do a great deal of mischief by going into the wood and cutting down, when they deny the intention to cut, and that they mean to do more than according to their accustomed right. That principle has repeatedly been repudiated; particularly by Lord Kenyon in *Strathmore v. Bowes*. There must be some fact or threat, not mere belief. In that respect these affidavits, except as to one defendant, are insufficient. With respect to the damage, where a common runs through a wood, it is well known, that the cattle pick up a great deal in the glades; and if damage is done thereby to the young wood, it is not injury; for it is the consequence of the right. The affidavits do not deny the right of common. They do not admit it. But the bill stating, that it was claimed, but never enjoyed, I should have thought those affidavits insufficient as to all the defendants; and the only question would have been, whether upon the ground of injunctions granted against trespass the injunction might be given against that defendant, who has threatened to cut down all the woods and fences; and yet it would be doubtful even against him: the bill bringing forward a semblance of title to do many of the acts he said he would do.

The principle as to the multiplicity of suits is very clearly stated in *Lord Teynham v. Herbert*,¹ that in these cases there would be no end of bringing actions of trespass; and so it might be frequently; for there might be very different rights of common, and very different justifications. One might have it for cattle *levant* and *couchant*; another for common without stint, etc. So is the *Mayor of York v. Pilkington*.² Yet there is a great difference, when, instead of filing a bill in the first instance, and submitting to this court to regulate the enjoyment in the meantime, he goes first to law; and, having failed there, comes here, not to establish his right at the hearing, but to prevent their enjoyment till the hearing. In this case, a justification upon a right

¹ 2 Atk. 483.

² 1 Atk. 282.

to common of pasture and estovers, the plaintiff permits himself to be nonsuited. The negligence of the agent is too slender a ground for deciding against persons, who have till the trial been in the exercise of the right, that, the trial is to weigh nothing in support of it. It is a trial at law. Suppose, this bill had been filed before an action, and I had granted an injunction upon the affidavits till the trial of an action directed by me; and there was a nonsuit: it would be extraordinary after that to apply for a continuation of the injunction: and the court would have some reason to reproach itself for having restrained the exercise of the right in the meantime. I think myself authorized to take what passed at law, as if an action had been directed by this court. After that nonsuit the plaintiff opens the place inclosed; and admits their right by permitting the enjoyment. Then he makes an agreement for a compensation for shutting them out; as far as it goes, an additional admission, at least not a denial of the right. His conduct therefore at and since the trial instead of affirming the allegations of the bill renders them improbable; and it is no answer, that it proceeded from mistaken advice, or advice not followed up; when there is so much evidence of right of common of pasture and estovers; the bill, too, alleging that claim: no negative of the right, to be put in the balance against the nonsuit upon that very point permitted by the plaintiff; the answer of the defendants; no passage in any one of the affidavits, which I look at entirely without prejudice to the question, whether I ought to look at them, or not, containing any assertion of marks of ancient inclosures, and that the cattle did not pasture here, as far as they could, while it was uninclosed: the defendants swearing to the enjoyment of the right of pasture; and in this way; that if the 130 acres are inclosed, they will not have sufficient common of pasture; upon which there is no contradiction whatsoever.

The injunction must be dissolved; and if there is any hardship as to the intermediate enjoyment, it is better that it should fall upon the plaintiff than upon the defendants.

SMITH v. COLLYER.

IN CHANCERY, BEFORE LORD ELDON, C., JANUARY 25, 1803.

[*Reported in 8 Vesey 89.*]

A MOTION was made to restrain the defendant from cutting timber.

The plaintiffs claimed under a general devise to them and their heirs of all and every the devisor's lands, etc., as well freehold as copyhold, and all other his real estates whatsoever and wheresoever.

The estates were in mortgage: but the plaintiffs by their guardians were in receipt of the rents. The defendant put in an answer; claiming as nephew and heir at law; insisting, that the will was not well executed.

The LORD CHANCELLOR said, this was quite a new case.

Mr. Cooke, in support of the motion.

The plaintiffs have no means of preventing or redressing this at law: the mortgagee having the legal title; and the mischief will be irremediable: no damages would be a compensation; and that is a ground for the jurisdiction; as was held in the *Duke of Somerset v. Cookson*¹ and *Pusey v. Pusey*,² in which cases an action might have been brought. In this case they both claim under the same person; and the defendant is not in possession; as in *Pills worth v. Hopton*.³

The LORD CHANCELLOR. I do not recollect any instance of this sort. The defendant denies that the plaintiffs are devisees. It is not waste, but trespass upon their own showing. There was no instance of an injunction in trespass till the case before Lord Thurlow upon a mine; to which I have alluded; which, though trespass, was very near waste. In that case, the first instance of granting an injunction in trespass, there was no dispute whatsoever about the right. Here the right is disputed. It was always surprising to me that the jurisdiction by injunction was taken so freely in waste, and not in trespass; for there is a writ at common law after action to restrain waste. But a trespass after one action may be repeated. I remember, when, if a plaintiff stated that the defendant claimed by an adverse title, he stated himself out of court.

COURTHOPE v. MAPPLESDEN.

IN CHANCERY, BEFORE LORD ELDON, C., DECEMBER 19, 1804.

[Reported in 10 Vesey 290.]

A MOTION was made by a landlord for an injunction to restrain cutting and removing timber, and committing any other waste: the plaintiff charging collusion by the defendant with the tenant.

Mr. Hollist and *Mr. Leach* in support of the motion.

Though in *Mogg v. Mogg*,⁴ an injunction under these circumstances was refused, Lord Thurlow very soon afterwards, in *Hamilton v. Worsefold*,⁵ altered his opinion and granted the injunction.

¹ 3 P. Will. 389.

² 1 Vern. 273.

³ [6 Vesey], 51.

⁴ 2 Dick. 670

⁵ In Chancery, November, 1786.

⁶ This case was stated from a note by Mr. Romilly.

The bill stated that the plaintiff was seised in fee; that his title had but re-

There was in that case no privity of estate between Worsefold and the plaintiff. The old rule was, that if a tenant suffers a third person to come upon the land and cut timber, he is himself guilty of waste. This case is the same: a person without right, after the tenant has attorned, coming upon the land without the privity of the landlord, and cutting timber: it is waste in both. The utmost the plaintiff could do is to go and carry away the timber; suffering all the disadvantage of having it cut at an improper time. He cannot go upon the land to stop another person cutting timber.

The LORD CHANCELLOR. I have no difficulty in granting the injunction in this case; but I will not be bound as to what is to be done upon a mere trespass; though it is strange that there cannot be an injunction in that case to prevent irreparable mischief: the rather, as there is a writ at common law to prevent the farther commission of waste during the trial; whereas, if the court will not interfere against a trespasser, he may go on by repeated acts of damage, perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases: the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction.

CROCKFORD *v.* ALEXANDER.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 23, 1808.

[Reported in 15 Vesey 138.]

THE plaintiff having contracted to sell an estate to the defendant, the latter obtained possession from the tenant, and began to cut timber; upon which the bill was filed, and a motion made for an injunction.

Mr. Cullen, in support of the motion, observed that this was a case of trespass.

cently accrued; and the tenants had not yet paid him any rent; that the defendant Worsefold pretended to have some claim to the estate; and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other defendants, the tenants; and had cut timber; and threatened to cut more. The bill therefore prayed, that Worsefold may be restrained from committing waste; and that the tenants may be restrained from permitting it.

The LORD CHANCELLOR, upon the motion for the injunction, at first had some difficulty about granting it; Worsefold being a mere trespasser; but at length his Lordship granted the injunction against both Worsefold and the tenants. Register's Book, A, 1786, folio 1.

The LORD CHANCELLOR. Although at law this defendant is a trespasser, he is in equity by the effect of the contract the owner of this estate; having taken possession under the contract; and the vendor is in the situation of an equitable mortgagee. This court has occasionally granted an injunction in cases of trespass as well as waste; and, having thought much upon this subject, I will grant this protection against cutting timber; until the power of the court to grant the injunction against trespass shall be fully discussed. Lord Thurlow refused the injunction in this case: a man, possessed of two fields, demised one, with the mines under it: the lessee found his way, working under ground, to the mines under the other field, which was not demised: Lord Thurlow held that to be trespass, not waste; and did not grant the injunction. There are, however, several cases, furnishing principles by analogy. In Lord Byron's Case it was destruction, not waste: there being no privity between Lord Byron and the persons who had the mills. There is no difference between destruction and trespass where there is no privity of estate; and at law the writ of *estrepement* may be had to prevent repetition of waste. I have therefore ventured to grant an injunction in trespass; and this defendant will find it very difficult to maintain, that he can use his legal character of trespasser, in order to enable himself to commit what is absolute destruction.

The order for the injunction was made.

KINDER v. JONES.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R.; SEALS BEFORE
EASTER TERM, 1810.

[*Reported in 17 Vesey 110.*]

THE bill, filed by trustees, tenants in fee-simple upon trust to sell, prayed an injunction to restrain the defendant from cutting down trees, until the boundary of the estate could be ascertained at law.

Mr. Newland, for the plaintiff, moved for an injunction under the following circumstances, stated by affidavit:

The estate consisted of a mansion-house, park, and other grounds. In a lane, adjoining the park on one side and grounds, belonging to the estate on the other, were standing many timber trees alleged by the plaintiffs to be extremely ornamental to the mansion-house and park, and which trees were alleged by the plaintiffs to belong to them, the lane being a private lane, and belonging to the estate. But the defendant threatened to cut down those trees; claiming to be en-

titled to them, as standing on part of the waste of a manor, of which he was the lord.

The LORD CHANCELLOR, finding on inquiry that the defendant had not been served with notice of this motion, said that he must certainly be served with notice in such a case; and expressed some doubt, whether the court had ever granted an injunction in the case of trespass, where the title was disputed.

Notice of the motion having been accordingly served on the defendant, the motion was renewed before the Master of the Rolls, sitting for the Lord Chancellor; and, the defendant not appearing, the injunction was granted.

THOMAS v. OAKLEY.

IN CHANCERY, BEFORE LORD ELDON, C., AUGUST 2, 1811.

[*Reported in 18 Vesey 184.*]

THE case, stated by this bill, was, that the plaintiff was seised in fee-simple of an estate, in which there was a stone quarry; and the defendant, having a contiguous estate, with a right to enter the plaintiff's quarry and take stone for building and other purposes, confined to a part of his estate called Newton Farm, had taken stone to a considerable amount for the purpose of using it upon the other parts of his estate; praying an injunction and account.

To this bill the defendant demurred.

Mr. Hart and *Mr. Horne*, in support of the demurrer, relied on the distinction between waste and trespass; this being a mere trespass; and the account too trifling to change the jurisdiction.

Mr. Benyon for the plaintiff.

The course of modern authority is to afford assistance in these cases, of coal mines, timber, etc., to prevent irremediable mischief: an injury which damages could not compensate. In *Mitchell v. Dors*,¹ and many other cases, your Lordship, following Lord Thurlow, gave relief; giving the injunction, where an action of trespass might be maintained; and the account follows the injunction; to prevent multiplicity of suits.

The LORD CHANCELLOR. The case has this specialty: the bill admits the defendant's right of entry into this quarry, and of taking stones for all the purposes of Newton Farm; though, if he takes for any other purpose, undoubtedly an action would lie: but is there any distinction between this case and that of a coal mine? Is not this taking away the very substance of the estate just as much as in the

¹ [6 Vesey], 147.

case of a coal mine? After the decisions that have taken place, this demurrer cannot be maintained. The plaintiff represents himself to be seised as tenant in fee of an estate, in which there is a stone quarry, that is parcel of the estate. He then states, which upon this occasion I must take to be true, that the defendant, having an estate in his neighborhood, consisting of Newton Farm, among other lands, as owner of that farm has a right to enter into the quarry for the purpose of taking stone, as far as he has occasion for building and other purposes upon that farm: but the plaintiff represents, that the defendant has taken stone, for the purpose of application, not upon Newton Farm only, but also upon his other estates, and to a very considerable amount. That is trespass beyond all doubt, and not waste; as there is no such privity between the parties as would make it waste. His entry for the purpose of taking stone with reference to Newton Farm is lawful: but, if under color of that right he takes stone for the enjoyment, not of his farm only, but his other estates, his entry to that extent is unlawful, and his act a trespass; and, if it is settled, that the court will interfere by way of injunction and account, this demurrer cannot prevail.

The distinction, long ago established, was, that, if a person, still living, committed a trespass by cutting timber, or taking lead ore, or coal, this court would not interfere; but gave the discovery; and then an action might be brought for the value discovered: but, the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value; though the law gave no remedy. In that instance therefore the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged: and I have frequently alluded to the case, upon which Lord Thurlow first hesitated: a person, having a close demised to him, began to get coal there; but continued to work under the contiguous close, belonging to another person; and it was held that the former, as waste, would be restrained: but as to the close, which was not demised to him, it was a mere trespass; and the court did not interfere: but I take it, that Lord Thurlow changed his opinion upon that; holding, that, if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief, to which in equity he was entitled. The interference of the court is to prevent your removing that, which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed; and whether it was trespass under the color of another's right actually existing, or not.

If this protection would be granted in the case of timber, coals, or lead-ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases; and not to put the plaintiff to come here for an injunction, and to go to law for damages.

The demurrer was overruled.

STEVENS v. BEEKMAN AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, OCTOBER 19, 1814.

[Reported in *Johnson, Chancery*, 318.]

MOTION for an injunction on a bill, stating that the plaintiff, on the 20th of March, 1806, purchased by deed, in fee, for a valuable consideration, of Jacob Glen, certain lands therein described, in the county of Saratoga, and adjoining Glen's Falls. That before the purchase, the plaintiff, for twenty years and upwards, had been in the quiet possession of the greater part of the premises, as tenant to Glen, and of the residue, for about three or four years. That Glen had good right and title to sell. That the plaintiff had continued, and still was in possession, as owner. That about three or four years ago, the defendant (Beekman) brought an action of ejectment against the plaintiff, for the south or west part of the premises, and which suit had never been brought to trial. That Beekman had no title. That the other two defendants, I. and G. Lumnendall, deriving, or pretending to derive, a title under Beekman, had entered on the premises, and cut down timber, and taken it away, without permission; and that the part of the premises on which such waste was committed, was principally, if not exclusively, valuable on account of the timber. That the two other defendants were still continuing to commit waste on the premises, and the plaintiff was apprehensive that the defendants would continue to do so, unless restrained by this court. The plaintiff, therefore, prayed for an injunction against a repetition of the trespass, and that the defendants may account for the timber already cut.

The bill was sworn to, and with an accompanying affidavit, that the two last defendants were poor.

J. V. N. Yates and Burr for the plaintiff.

The CHANCELLOR. This is a case of an ordinary trespass upon land, and cutting down the timber. The plaintiff is in possession, and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and if the pre-

edent were once set, it would lead to a revolution in practice, for trespasses of this kind are daily and hourly occurring.

I doubt, exceedingly, whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. Such cases are generally of local cognizance; and drawing them into this court would be very expensive, and otherwise inconvenient. Lord Eldon said, that there was no instance of an injunction in trespass, until a case before Lord Thurlow, relative to a mine, and which was a case approaching very nearly to waste, and where there was no dispute about the right. Lord Thurlow had great difficulty as to injunctions for trespass; and though Lord Eldon thought it surprising that the jurisdiction by injunction was taken so freely in waste, and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases, of a special nature, and where irreparable damage might be the consequence, if the act continued. It has also been allowed in cases where the trespass had grown into a nuisance, or where the principle of multiplicity of suits among numerous claimants was applicable.¹ There is the less necessity for the interference of this court, since the statute² makes the cutting down timber a misdemeanor punishable by fine and imprisonment, and also gives the party injured, treble damages. There is nothing in this case so special and peculiar as to call for this particular relief, and especially, when I am not justified by any established practice and precedent.

Motion denied.

JOHN JONES v. WILLIAM JONES ET AL.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., MARCH 17.
JULY 29, 1817.

[Reported in 3 *Merivale* 160.]

THE bill, filed July 3, 1816, stated that William Jones (deceased) was at the time of his death seised of large freehold and copyhold estates in the county of Suffolk, and had contracted to purchase other estates in the same county, and was also possessed of leaseholds and of a considerable other personal estate; and that he died on the 31st January, 1814, intestate and without issue, leaving the plaintiff his heir-at-law, who at his death became entitled to all his said real estates. The bill further stated that the testator was very old and

¹ *Mitchell v. Dors*, 6 Ves. 147; *Hanson v. Gardiner*, 7 Ves. 305; *Smith v. Coll-yer*, 8 Ves. 89.

² N. R. L., Vol. I., 525.

infirm, and for some time previous to his death not of disposing mind, but that, after his death, one Frost, an attorney, produced to some of the relations who were assembled at the house of the deceased, several loose sheets, which he informed them were the testator's will, made by him only two days before his death; one only of these sheets being signed with his name, and not attested so as to pass real estates, by which it appeared that he had given large parts of his real estates to his nephews (the three first named defendants), and other parts thereof, (together with his personal property,) to the defendants Taylor and Coker (whom he also appointed executors) upon trust to sell, and pay divers legacies and annuities; and, as to the residue, in trust for the defendant Thomas Jones. That this will had never been proved; but the devisees had entered into possession of the estates thereby given to them respectively, and the trustees and executors had also proceeded to act under the trusts thereby reposed in them. The bill further alleged that the plaintiff intended to bring actions for the recovery of the estates, but that he could not safely proceed without a discovery of the matters aforesaid, especially of any outstanding terms or other incumbrances which might be set up to defeat him at law, and also that, from the extent of the property, and the number and influence of the persons claiming under the will, he could not hope for a fair trial within the county; for which reason the bill claimed the assistance of the court in directing an issue *devisavit vel non* to be tried in another county. The prayer of the bill was as follows: "That the defendants may answer the premises, and that after a full discovery of the matters aforesaid it may be declared that the said pretended will was not the true last will of the said William Jones, and that the said rough draft bearing date the 29th day of January, 1814, may be declared to have been obtained from the said William Jones by fraud, if signed by him in mistake and ignorance of its contents, and that the same may be delivered up to be cancelled, or that an issue, whether the said William Jones made any will or not, may be directed to be tried at the assizes to be holden in and for any county adjoining the said county of Suffolk; and that all proper and usual directions may be given for the trial of such issue; and that the defendants may produce all the title-deeds, evidences, and writings relating to the said William Jones's real estates, or such of them as may be necessary on such trial, and that they may be restrained from setting up any outstanding mortgage term or terms so as to defeat the plaintiff's claim in any issue or action directed by the court, or which the plaintiff may be advised to bring for the recovery of any of the said real estates, or the rents or profits thereof; and that, in the meantime, the defendants (particularly the trustees

and executors and also the said Henry Jones) may be restrained by injunction from committing any spoil, waste, or destruction on the said William Jones's real estate, or any part thereof, and from selling and disposing of the same real estates, or any part or parts thereof, or charging or incumbering the same, to any person or persons; and that an account may be taken of the rents and profits of the said William Jones's real estates possessed or received by the defendants, etc., since the death of the said William Jones; and that a receiver may be appointed thereof; and that the plaintiff may be immediately let into possession of all such parts of the said copyhold estates of the said William Jones as was not surrendered to the uses of his will; and that an account may also be taken of the said William Jones's personal estate and chattels come to the hands or use of the said defendants, etc.; and also an account of the said William Jones's debts and funeral expenses; and that the said personal estate may be applied in the payment of his debts and funeral expenses in a course of administration; and that the clear surplus thereof, and the names and shares of the plaintiff and of the other parties who, whether as the next of kin or representatives of the next of kin of the intestate, shall be entitled to a distributive share and shares thereof, may be ascertained; and that for those purposes it may be referred to the Master to inquire who were the next of kin of the said William Jones at the time of his death, or who were or are the representatives of such next of kin, being brothers or sisters; and if such or any of such next of kin, a child or children of a brother or sister, are or is since that time dead, who are or is their or his or her personal representatives or representative; and that all usual and proper directions may be given for taking the accounts, and making the inquiries aforesaid; and that the defendants, the pretended executors, may be restrained from interfering with the personal estate; and that the receiver to be appointed as aforesaid may be as well the receiver of the personal estate and effects, and the interest, dividends, and produce thereof, as of the rents and profits of the real estate."

To this bill general demurrs were put in by the several defendants.

Bell and Barber in support of the demurrs.

Hart, Agar, and Heys in support of the bill.

The MASTER OF THE ROLLS. If this had been a bill merely for a discovery, there are several parts of it to which an answer must undoubtedly have been given. In the body of the bill there is a statement "that the plaintiff intended to bring an action or actions at law for the recovery of the freehold and copyhold estates devised by the pretended will"; but it is alleged "that, without the aid and assist-

ance of this court in compelling a discovery, he cannot safely proceed to trial in such action or actions."

But he concludes with praying relief, upon the same objects, with regard to which he had before stated that he only wanted a discovery in aid of an action. For he prays, that this court will declare, "that the pretended will was not the true will of the late William Jones, and that the same may be delivered up to be cancelled"; and, as consequential on that relief, he prays an account of rents and profits of the real estate—an account of the personal estate—of debts and funeral expenses—an inquiry as to next of kin, and a distribution of the clear surplus.

It is impossible that, at this time of day, it can be made a serious question, whether it be in this court that the validity of a will, either of real or personal estate, is to be determined. There is, however, an alternative prayer, that the court will direct an issue to be tried; and then certain other directions are sought, as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir-at-law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment; and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment. If he can have no issue, can he have those consequential directions that are asked only on the supposition that an issue is to be granted? Although the intention to bring an action had been stated in the bill, it is not with reference to an action, but to an issue, that some of the directions are prayed for as necessary for a proper trial of the merits. It is prayed, that *the issue* may not be tried in Suffolk, but in some adjoining county; and that the defendants may produce all the title-deeds, evidences, and writings relating to the said William Jones's real estates, on *such trial*. But, supposing an action had been brought, and that the prayer referred to such action; does a bill in equity lie to change the venue on the ground that no fair trial can be had in the county where the lands are situated?

As to the title-deeds, the bill merely states the fact, that the defendants have the possession of them, but not that they are in any way necessary to enable the plaintiff to recover at law. He stands solely on his title as heir, and does not show how the required production could be of the least service to him. As Lord Roslyn says in *Lady Shaftesbury v. Arrowsmith*¹: "The title of the heir is a plain one, and it is a legal title. All the family deeds together would not make his

¹ 4 Ves. 66.

title better or worse. If he cannot set aside the will, he has nothing to do with the deeds."

When the plaintiff comes to ask that the defendants may be restrained from setting up any outstanding terms, the language is varied; for it is, "so as to defeat the plaintiff's claim in any issue or action directed by the court, or which the plaintiff may be advised to bring, for recovery of any of the real estates, or the rents and profits thereof." This undoubtedly would be proper relief to ask, if it had been averred that there were any outstanding terms. But the case of Barber *v.* Hunter is a direct authority that the court will not proceed on a mere vague allegation that the action may be defeated by setting up outstanding terms. The case before the Vice-Chancellor of Armitage *v.* Wadsworth¹ shows, that, if the assertion were made, it might be met by a negative plea.

Then there is a prayer, "that, in the meantime," (that is, I suppose, till the trial of such issue or action,) "the defendants may be restrained from committing any spoil, waste, or destruction on the said William Jones's real estates, and from selling or disposing of or charging and encumbering the same, and that a receiver may be appointed." No case was cited in which the court has interfered, at the suit of heir or devisee, to restrain waste, spoil, or destruction, by either, while they are litigating their adverse rights in a court of law. One should think the case of the devisee a stronger one than that of the heir; because, till the will is set aside, the *prima facie* title is in the devisee. Yet in Smith *v.* Collyer,² an injunction was refused, when applied for by the devisee against the heir. I own I cannot see a very good reason why the court, which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But, as a condition of such interference, the court would certainly expect it to be shown, that the party applying was proceeding with all due expedition to bring the question to a decision; whereas here, the plaintiff, filing the bill about two years and a half after the testator's death, does not state that, even then, any action had been brought; whilst the acts of waste and destruction complained of are stated to have been committed soon after the death of the testator. If the court will not interpose to stay waste, *a fortiori* will it refuse to appoint a receiver, or to restrain the devisee from exercising other acts of ownership over the property.

Then there is a prayer, that the plaintiff may be let into immediate possession of all such parts of the copyhold estate as were not surrendered to the use of the will. That is mere legal relief. Whether, in

¹ 1 Madd. 189.

² 18 Ves. 89.

fact, there were any unsurrendered copyholds, might be matter of discovery—but the remedy is at law.

There is a statement that the testator had contracted for the purchase of certain estates, of which no conveyance had been made to him, without saying whether before or after the will, or at all pointing to any relief to be grounded on that statement; nor can I guess at any that could be administered in this suit.

The only remaining part of the prayer is, "that the executors may be restrained from interfering with the personal estate, and that the receiver of the real estate may also be the receiver of the personal estate." It is observable, that this prayer is wholly indefinite. It is not for any particular period, or during the dependence of any particular suit, that the injunction and the receivership are prayed for. The court has, in several instances, appointed a receiver of personal estate pending a suit in the Ecclesiastical Court—but, in every case in which it has done so, it has appeared that such a suit was depending, whereas there is no such statement in any part of this bill. All that is stated is, "that the executors have not yet proved the will, though they have attempted to do so." What the obstacle was does not appear. It may now be removed. It is not stated that the next of kin have entered a *caveat*, or taken any step that would produce a suit. The ground of this court's interference is, that when a suit is depending, the property must remain to a degree unprotected, till its determination. If the will stands, the plaintiff is a perfect stranger to the personal estate; for he is neither a creditor, nor a legatee. Why, therefore, is the court to take care of the personal estate at his instance? The ground can only be, that there is a question somewhere depending, in the result of which it may appear that he is interested in the personal estate, inasmuch as the will may be set aside. But this plaintiff does not state that there is any such question, either depending, or about to be raised. He, therefore, can have no right to have a receiver of the personal estate appointed. The result then is, that there is no part of the bill, as to which the plaintiff has shown himself entitled to any relief. And, although (as I have already said) he might have had a right to some of the discovery that is sought, if he had sought nothing more, yet it is now settled that, to support a general demurrer to a bill seeking both discovery and relief, it is sufficient to show that the plaintiff is not entitled to the relief which he prays.

The demurrer in this case must, therefore, be allowed.

H. LIVINGSTON *v.* E. P. LIVINGSTON.

IN THE COURT OF CHANCERY OF NEW YORK, DECEMBER 30, 1822.

[Reported in 6 Johnson, Chancery, 497.]

THE bill stated, that the plaintiff was seised and possessed, by himself and his tenants, of a tract of land in the manor of Livingston, being part of great lot No. 4, in the town of Livingston, and lying to the north and west of Ruleff Janse's Kill. That he derived title by the will of his father; which he set forth, and the title, as far back as 1728. That the defendant has, in his own right, and in right of his wife, a number of tenants, in the town of Clermont; and they, by authority derived from or under him, had, shortly before filing the bill, entered upon the land of the plaintiff, and cut wood and timber; and the defendant declared, and directed his tenants to declare, that he and they had right so to do, for the use of their houses and upon their farms in Clermont. That the plaintiff's father and grandfather always held and enjoyed the said manor as an absolute and unencumbered estate, in fee, saving only the rights of their own tenants, holding under them; and no right to cut wood there, by any person residing in Clermont, had been assented to or exercised. That in 1812, Elias Hicks, who resided in Clermont, as tenant of R. R. Livingston, father of the wife of the defendant, and under whom the defendant claims, cut wood on lot No. 4, and in that part now possessed by the plaintiff, and the father of the plaintiff sued him in trespass; that Hicks undertook, by plea, to justify, as tenant of R. R. L., who claimed, for himself, and his tenants of Clermont, a right to cut and carry away wood from the manor of L., necessary for their families and farms in Clermont; and the agent of R. R. L. defended the suit. That the cause was tried at the Columbia circuit, in August, 1815; and, after the defendant had given his proof, the Chief-Judge ruled, that the plaintiff was entitled to recover; but a verdict was taken for the plaintiff, at his request, subject to the opinion of the Supreme Court, upon a case to be made, and the damages were assessed at 100 dollars for the wood and timber cut. A similar verdict was taken, also, in another similar case, against Marks Platner. That the case against Platner was argued and decided in the Supreme Court, in favor of the then plaintiff, (a tenant of the father of the plaintiff,) and the defendant, and all claiming under him, have desisted, since, from trespasses on the wood, etc., until the death of the father of the plaintiff, in November last. That the plaintiff has given directions to have the case brought to argument in the suit against Hicks; but the trespasses, in the meantime, will greatly injure the value of the plaintiff's

estate. Prayer, for an injunction to restrain the defendant and his tenants from cutting timber, etc.

E. Williams for the plaintiff.

The CHANCELLOR.¹ This is not the case of a stranger entering upon the land, as a trespasser, without pretence of right, and cutting down timber. In such a case, Lord Thurlow, in *Mogg v. Mogg*,² refused to interfere by injunction. This is analogous to a case before Lord Camden, referred to by the counsel in *Mogg v. Mogg*, and which Lord Thurlow seemed to approve of. It was, where a defendant claimed a right to estovers, and, under that right, cut down timber; there was a claim of right, and, until it was determined, it was proper to stay the party from doing an act, which, if it turned out he had no right to do, would be irreparable. So, also, in *Hanson v. Gardiner*,³ the injunction was granted, where the defendant claimed common of pasture and estovers; and, in that case, Lord Eldon observed, that the law, as to injunctions, had changed very much, and they had been granted much more liberally than formerly. They were granted in trespass, when the mischief would be irreparable, and to prevent a multiplicity of suits.

In *Mitchell v. Dors*,⁴ the defendant, in the process of taking coal, had begun to work into the land of the plaintiff, and though this was strictly a trespass, yet the injunction was granted, because irreparable mischief would be the consequence if the defendant went on. In *Hamilton v. Worsefold*, and in *Courthope v. Mapplesden*,⁵ injunctions were granted against a trespasser entering with permission, or by collusion with the tenant, and cutting timber.

Lord Eldon repeatedly suggested the propriety of extending the injunction to trespasses, as well as waste, and on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. The distinction, on this point, between waste and trespass, which was carefully kept up during the time of Lord Hardwicke, was shaken by Lord Thurlow, in Flamang's case, respecting a mine, and seems to be almost broken down and disregarded, by Lord Eldon. This protection is now granted in the case of timber, coals, lead ore, quarries, etc.; and "the present established course," as he observed in *Thomas v. Oakley*,⁶ "was to sustain the bill for the purpose of injunction, connecting it with the account, in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages."

The injunction was granted in *Crockford v. Alexander*,⁷ against

¹ James Kent.—ED.

² Dickens' Rep. 670.

³ 7 Vesey 305.

⁴ 6 Ves. 147.

⁵ 10 Vesey 290, and note, *ibid.*

⁶ 18 Ves. 184.

⁷ 15 Ves. 138.

cutting timber, when the defendant had got possession under articles for a purchase; and in *Tworl v. Tworl*,¹ against cutting timber between tenants in common; and in *Kender v. Jones*,² where the title to boundary was disputed; and in the case of *Earl Cowper v. Baker*,³ against taking stones of a peculiar and valuable quality at the bottom of the sea, within the limits of a manor; and in *Gray v. Duke of Northumberland*,⁴ against digging coal upon the estate of the plaintiff; and in *Thomas v. Oakley*, against exceeding a limited right to enter and take stone from a quarry. In all these cases, the injury was considered a trespass, and in two of them it was strictly so; and the principle of the jurisdiction was to preserve the estate from destruction. But I can safely allow the injunction in the present case, without going to the extent of these latter cases, or following the habit, as Lord Eldon termed it, in *Field v. Beaumont*,⁵ of the English Chancery, in granting injunctions in cases of trespass as well as of waste. Here has been one action of law, in which the claim of the defendant to estovers in the lands of the plaintiff has received a decision against him, and there is another suit at law still depending, in which the same question arises. It is just and necessary to prevent multiplicity of suits, that the further disturbance of the freehold should be prevented, until the right is settled; and the case decided by Lord Camden, is a sufficient authority for the interposition asked for in this case.

The recent decision by the Vice-Chancellor, in *Garstin v. Asplin*,⁶ shows, that it is not the general rule, that an injunction will lie in a naked case of trespass, where there is no privity of title, and where there is a legal remedy for the intrusion. There must be something *particular* in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy.

Injunction granted.

THE NEW YORK PRINTING AND DYEING ESTABLISHMENT *v.* FITCH AND ANOTHER.

IN THE COURT OF CHANCERY OF NEW YORK, JUNE 5, 1828.

[Reported in 1 *Paige* 97.]

THE bill in this cause stated that the complainants, since 1824, have been and now are the owners and proprietors of certain real estate on Staten Island, on which they have made erections at great

¹ 16 Ves. 128.

² 17 Ves. 110.

³ 17 Ves. 128.

⁴ 17 Ves. 281.

⁵ 1 Swanston 208.

⁶ 1 Madd. Ch. Rep. 150.

expense for manufacturing purposes, and of which they are in the actual and daily occupation and use, for the purposes contemplated in their act of incorporation; that among the erections and improvements connected with that real estate, is a dock and landing of great value and convenience to the complainants, in reference to their manufacturing business; that the defendants, the one as the master and the other as the nominal owner of the steamboat *Marco Bozzaris*, carrying freight and passengers, have lately commenced the practice of stopping from day to day, and coming to with the said boat at the complainants' dock and landing, and of going upon the dock and fastening to the same, and discharging and taking in passengers and freight, without the consent and against the interest of the complainants, and that they continue the same from day to day in defiance of the complainants' rights; that the defendants pretend the dock and landing are public, and that all persons have a right to make use of it; whereas the complainants charge that it is their own exclusive property, and neither the defendants nor the public have any right of way, or rightful privilege over or in relation to the same.

The bill prays for a perpetual injunction, to restrain the defendants from using the dock or landing, and for general relief.

A preliminary injunction has been allowed by the master, which the defendants apply to dissolve on the matter of the bill only.

D. Selden for the defendants.

H. W. Warner for the complainants.

The CHANCELLOR.¹ Where a motion is made to dissolve the injunction on the matter of the bill only, agreeably to the 75th rule of this court, the case must be viewed in the same manner as if it were an original application for the injunction, and opposed by the defendants' counsel. If the complainants were now asking for this preliminary injunction, is this a case in which it would be proper for this court to grant their application? There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, the preliminary injunction before answer, is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay dangerous.² The case of *Waters v. Taylor*,³ relied upon by the complainants' counsel for the purpose of showing that an injunction will be granted

¹ Reuben H. Walworth.—ED.

² *Ogden v. Kip*, 6 John. Ch. R. 60.

³ 2 Ves. & Beame 299.

to prevent a multiplicity of suits at law, was a decision upon the hearing, and in a case of partnership.

Whether the facts stated by the counsel on the argument, in relation to the controversy in this cause, would be sufficient to sustain the jurisdiction of this court, on the principle of quieting them in the enjoyment of their property, and preventing the necessity of a perpetual litigation, it is not necessary to decide at this time.

It is sufficient for the decision of the question immediately before the court, that it does not appear that any serious damage or irreparable injury will take place, if the defendants continue to run their boat and land their passengers, as they have heretofore done, until the complainants' rights are admitted by the answer, or settled on the hearing. On the other hand, I can readily see that retaining the preliminary injunction may produce great injury to the defendants, and for which they would be entirely without remedy, if it should finally appear that they were only in the exercise of their legal rights.

The case of *Livingston v. Livingston*,¹ and the several cases there referred to, settle the principle that an injunction will lie to restrain trespasses, even where there is a legal remedy for the intrusion; but there must be something particular in the case, to sustain the jurisdiction of the court so as to bring the injury under the head of quieting the possession, or to make out a case of irreparable mischief; or the value of the inheritance must be put in jeopardy by the continuance of the trespass.

The case made by the complainants' bill, is not sufficient to justify the court in granting or retaining the preliminary injunction before answer, and it must therefore be dissolved.

DEERE v. GUEST.

IN CHANCERY, BEFORE LORD COTTONHAM, C., AUGUST 6, 1836.

[*Reported in 1 Mylne & Craig 516.*]

THE bill stated that William Rees, at and previously to the time of his decease, was entitled as mortgagee in fee-simple to a certain mes-usage and farm in the parish of Merthyr Tidvil, called Rhydd y Beth: That on the 29th of January, 1820, William Rees died intestate and without issue, leaving the plaintiff, Mary, his widow, who thereupon obtained letters of administration of his estate and effects, and who in the month of June, 1821, intermarried with the plaintiff, John M. R. Deere: That there was due to Rees at the time of his death on the

¹ 6 Johns. Ch. Rep. 497.

security of the mortgage, a sum of £1,293 3s. 11d. for principal, and £171 16s. 11d. for interest, and that the defendant, William Lewis, was then in possession of the mortgaged premises as owner of the equity of redemption: That at Lady-day, 1826, the plaintiff, John M. R. Deere, in right of the plaintiff, his wife, entered into possession of the mortgaged premises, and continued thenceforward to the present time to be in possession, and to receive the rents and profits thereof: That the other defendants carried on business in copartnership together as iron-masters at Dowlais, near Merthyr Tidvil, under the name of the Dowlais Iron Company: That the mortgaged premises were situate between the Dowlais Iron Works and the Castle Limestone Quarries, which were, in the year 1833, and still continued to be, in the possession of the Dowlais Iron Company: That in the year 1833, the Dowlais Iron Company began to construct a tram-road from the Castle Quarries to the Dowlais works for the purpose of conveying limestone to their iron works, and that the shortest and most convenient line for such tram-road was across the mortgaged property possessed by the plaintiffs: That the Dowlais Company thereupon applied to one Henry, who then occupied the premises as a yearly tenant under the plaintiff, John M. R. Deere, and asked his consent to the tram-road being made across the mortgaged farm, which consent he gave, stating that he was only the tenant, and under the belief that the plaintiff, his landlord, had already given his consent: That at the time of making such application, or shortly afterwards, Henry was informed by the Dowlais Company or their agents that the consent of the plaintiffs had been requested and obtained, although in point of fact no such request was ever made to either of the plaintiffs: That the Dowlais Company thereupon proceeded to construct the tram-road across the plaintiffs' farm called Rhydd y Beth, and in so doing cut up and destroyed portions of two meadows, part thereof, to the extent of half an acre; and they made divers mounds and cuttings across two of the best meadows, and broke down the fences, and greatly injured the farm; and they put iron rails resting on stone blocks upon the road, and they also caused an ancient highway which passed through the farm to be shut up, and thereby obstructed and interrupted the approaches thereto: That the Dowlais Company completed the tram-road in September, 1833, and from that time have continued to use it for the purpose of conveying lime in wagons to their iron works. That in the month of March, 1836, Henry ceased to be tenant of the mortgaged property, but that he never communicated to the plaintiffs the fact of the tram-road having been made: That the plaintiffs who resided upwards of a hundred miles from Merthyr Tidvil, did not become aware of the existence of

the tram-road until the month of February last, when an application made to the plaintiff, J. M. R. Deere, as owner of the property for his consent to a bill then in Parliament for the construction of the Taff Vale railway led him to make inquiries from which he discovered the existence of the Dowlais tram-road, and that he thereupon commenced an action of trespass against the defendants, the Dowlais Company, to recover damages for the injury thereby done to his farm: That in April last the plaintiff, John R. M. Deere, proceeded to the tram-road on his farm and caused his workmen to take up several of the iron rails, and directed them to build up two walls, one at each end of the tram-road, and to restore the land to the state in which it was before it was taken by the Dowlais Company; but that while the plaintiff's workmen were so engaged, they were attacked by the agents of the Dowlais Company, who beat the plaintiff's workmen, replaced the iron plates over the tram-road, and forcibly interrupted and put a stop to the operations directed by the plaintiff: That on the 30th of April last, the plaintiff served the defendants with a notice to desist from the use of the tram-road, and also required them to desist from such interference with his workmen.

The bill charged, that the defendants were well aware that the land over which they had carried their tram-road belonged to the plaintiff, John M. R. Deere, as mortgagee in possession in right of his wife, and that they had made frequent proposals to him for the purchase thereof, and that in consequence of his refusal to accede to such proposals, they had frequently endeavored by underhand means to obtain possession of the lands in question from one Morgan, who was the present occupying tenant thereof, with the exception of the tram-road, the right of which the plaintiff, John M. R. Deere, had reserved to himself: That the defendants threatened in the event of the plaintiff attempting to remove the impediments placed by them on the farm, to beat and forcibly interrupt the plaintiff's workmen: That the existence of the tram-road was a serious and continuing injury to the plaintiffs' farm and lands, and interfered with the cultivation and enjoyment thereof, so that the plaintiffs were unable to obtain so high a rent for the same. The bill further charged that the defendants, the Dowlais Company, were making cuts and water-courses over the farm for the purpose of draining another tram-road which belonged to them, adjoining the one complained of, and that they ought to be restrained from so doing: That the defendants, the Dowlais Company, were combining with the other defendant, William Lewis, who was, as they pretended, the owner of the equity of redemption of the mortgaged farm, and from whom they alleged they had purchased the right of making the tram-road over the farm: That

there was now due a sum of £2,182 3s. 11d. on the security of the mortgaged premises, and that such security was greatly prejudiced by the tram-road.

The bill prayed that the defendants, the Dowlais Company, and their agents and workmen, might be restrained from using the tram-road across the plaintiffs' lands called Rhydd y Beth, or from committing any work or spoil upon such lands; and that they might also be restrained from interrupting the servants and workmen of the plaintiffs employed upon the lands, and from making or continuing to make any cuts, drains, or water-courses over or across the farm, and that they might be decreed to restore the farm and lands, and the ancient highway to the state in which the same were before the construction of such tram-road.

The defendants, the Dowlais Iron Company, filed a general demurrer to the bill for want of equity.

The Vice-Chancellor allowed the demurrer, and the plaintiffs thereupon appealed.

Mr. Wakefield and *Mr. John Romilly* for the bill.

Mr. Jacob and *Mr. W. M. James*, *contra*, were not called upon by the court.

THE LORD CHANCELLOR. The allegation upon this bill is that the tram-road complained of was made by the defendants across the farm of the plaintiffs by the license of the occupying tenant, and that the possession of that which now constitutes the road was at the time vested in the tenant and not in the landlord. Even now it is nowhere distinctly alleged that the plaintiff is at present in possession; for the allegation in the former part of the bill coupled with the passage in which the plaintiffs state that Morgan is the occupying tenant of the lands with the exception of the tram-road, the right of which the plaintiff has reserved to himself, amounts simply to this, that a former tenant having improperly given leave to the defendants to occupy a part of the land for the purposes of their road, the plaintiffs have restricted the possession of the new tenant to the part which is not so occupied.

But however that may be, the thing here complained of has been done; the tram-road has, with the leave of the tenant in possession, been completed, and the court is asked, by the bill, to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it, and from interrupting the servants and workmen of the plaintiffs, in their attempt to destroy it; in other words, the court is virtually asked to eject the defendants, and authorize the plaintiffs themselves to take possession of the tram-road. The case originally may have been a

case of waste,—waste occasioned by the cutting of the tram-road and the laying of the iron rails over the plaintiffs' land; but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and the plaintiffs have their proper legal remedy against them as such. The *dicta* of Lord Eldon in *Norway v. Rowe*,¹ have no application to a state of circumstances like the present. The case there referred to by his lordship was a case of waste committed by a stranger colluding with the tenant; a case in which the landlord would have had a right against the tenant, and, therefore, against a person who claimed through the tenant.

The appeal must therefore be dismissed.

Upon the hearing of the demurrer in the court below, a motion for a special injunction in the terms of the prayer had been brought on *pro forma* by Mr. Wakefield at the time when he opened the bill. The motion was supported by affidavits verifying the material allegations, but the argument was taken on the demurrer, which, it was admitted, raised precisely the same question as the motion.

The Vice-Chancellor, when he allowed the demurrer, made an order refusing the motion with costs. The plaintiffs, after they had presented their petition of appeal against the order allowing the demurrer, renewed the notice of motion, before the Lord Chancellor, and the motion was accordingly set down in his lordship's paper immediately after the appeal.

Mr. Jacob asked for the costs of the motion, which was now to be called on, and which the court was bound to dispose of. The motion must of course follow the fate of the appeal, and the defendants were entitled to have it dismissed with costs.

Mr. Wakefield, *contra*, submitted, that as the cause was out of court by the effect of the Vice-Chancellor's judgment allowing the demurrer, there was no cause in existence in which the notice of motion before his lordship could have been given; and that although notice had been given, that, in the case the Lord Chancellor disallowed the demurrer, the plaintiffs might have an opportunity of moving for an injunction in the terms of the notice, yet as his lordship had allowed the demurrer, he could have no jurisdiction to entertain any question touching the costs of the motion.

The Lord Chancellor, however, said that he thought he was bound to deal with the matter, precisely as if it stood before the Vice-Chancellor. The plaintiffs had given their notice of motion in this court, after their appeal against the order on the demurrer had been

brought, and when the cause therefore was still subsisting. In substance they appealed against both orders; the whole must be considered as parts of one and the same proceeding; and the defendants upon that ground were in his opinion entitled to the costs of the motion, as well as to the costs of the appeal.

JOHN HAIGH ET AL. v. ROBERT JAGGAR ET AL.
IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE, V. C., AUGUST
2 AND 4, 1845.

[*Reported in 2 Collyer 231.*]

THIS was a motion, that the defendants, the Jaggars, their bailiffs, servants, agents, and workmen, might be restrained by injunction from further breaking into and entering upon the lower bed of coal demised to the plaintiffs, and from digging, raising, and taking coals therefrom, and from otherwise interfering with the rights, liberties, and privileges of the plaintiffs, under the lease granted to them.

The plaintiffs claimed to be lessees for forty years under a demise to them from the defendants, Joseph Dickenson and Henry Sykes, of certain closes of land, and of a bed of coal, called the Robin or lower bed of coal, lying under those closes.

The defendants, the Jaggars, claimed to be lessees of some lands adjoining the plaintiffs' closes, and of the lower bed, by virtue of an indenture of lease, dated the 27th September, 1804, and made between John Sykes, an ancestor of the defendant, Henry Sykes, and a former owner of the closes demised to the plaintiffs, of the one part, and Joseph Jaggar, deceased, and others, of the other part.

The plaintiffs, by their affidavits in support of the motion, stated (following the allegations of the bill), that, in August, 1844, the defendants, the Jaggars, through a coal pit sunk in the lands which had been demised to them, and near the closes comprised in the said lease to the deponents, broke into and entered upon the said lower bed of coal demised to the deponents, and commenced digging, raising, and taking away large quantities of coal from the said lower bed; that in September, 1844, the deponents caused the last-named defendants to be served with a notice in writing of the lease granted to the deponents, and that, unless the said defendants immediately made proper and reasonable compensation to the deponents for the trespass and damage committed by them, and for the coal so taken, an action at law would be commenced against them without further notice; that the defendants refused to comply with the terms of such

notice; and that in February last the deponents commenced an action against the defendants, Joseph Jaggar and John Jaggar, for the said trespasses and damage; that this action was discontinued, and another action brought in June last, to which, on the 4th July, the defendants at law pleaded several pleas, amounting to a plea of not guilty, and pleas justifying the trespasses and setting up a claim on the part of the defendants, the Jaggars, under a pretended indenture of the 27th day of September, 1804 (the lease before mentioned), to the said lower bed of coal demised to the deponents as aforesaid; but the deponents were not able to proceed to trial in the said action at the assizes for the county of York, held on the 10th day of July.

The plaintiffs then, after alleging that the defendants had continued to work the coal since August, 1844, and that, in carrying away the coals from the lower bed, they had damaged a great portion of the remainder of the coal, stated, that, if the defendants were allowed to proceed, irreparable damage would be done to the works and mines of the plaintiffs.

The plaintiffs further stated, that they were advised, and believed, that, if the alleged indenture of lease was ever made to the defendants, the Jaggars, their rights and interests under it (the term in it being stated to be twelve years only) had long since ceased and determined; and that they ought to be barred from setting up such lease by the statute of limitations. The plaintiffs also alleged, that, at the time their own lease was granted, they had no notice of the alleged lease to the defendants.

The defendants, by their affidavits, denied the allegations in the plaintiffs' affidavits as to irreparable mischief. They stated various acts of ownership, as the repairing of fences, etc., which had from time to time, till within seven years, been done by the defendants, or those through whom they claimed, round and adjoining the coal-pits. They admitted, however, that the pits were left open ready for the getting and digging of the lower bed of coal, when and as soon as the same should be loosed from the water in which the same was enveloped and fast, and that the lower bed was fast with water, and could not be worked, and remained so till 1844, when it was loosed in part by the working of the adjoining collieries.

With reference to the alleged termination of their lease, after stating that it had been confirmed in succession by different descendants of John Sykes, they set forth a proviso contained in it to the effect, that, notwithstanding the term of twelve years granted by the lease, they should have power (computing the time from the commencement of sinking any pit) to get, sell, and raise coals till the quantity of six acres should be gotten and disposed of.

Mr. Malins and *Mr. J. T. Humphry* for the motion.

Mr. Wigram and *Mr. Elmsley*, for the defendants, were not called upon to address the court.

The VICE-CHANCELLOR. Whether the law of the country, in its actual condition, provides for the protection of property in litigation, pending that litigation, as completely or effectually as in the present state and habits of society is sufficient for general convenience,—whether, since the extensive changes which, within the last few years, the Legislature has introduced, the writ of estrepelement (as to which Fitzherbert, Brooke, and Coke, furnish or refer to all, or almost all, the useful learning), is a remedy that remains in existence or can be obtained,—whether, with reference to a dispute or an action, such as that existing between the present parties, that or any such writ ever could have issued, it is not necessary for me to intimate any opinion. But I am not aware of any authority that would support me in saying, that the Court of Chancery, as a court of equity, has jurisdiction to interfere for the purpose of giving relief or protection in all cases such as those, or analogous to those, or within the same reason and principle as those, in which the writ of estrepelement lies or did lie. I am not, however, convinced that, where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession, by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts. It is, I think, certainly true, that the Court of Chancery does not treat questions of destructive damage to property now exactly as it did forty or fifty years back—that its protection in such respects is more largely afforded than it then generally was. In saying which, I do not merely allude to the various injunctions against railway companies, that have of late years been so frequent. Perhaps, one of the most remarkable cases is *Smith v. Collyer*, reported in 8 Ves.¹. That was before no less a person than Lord Eldon; yet, I am not perfectly satisfied, that, in the same circumstances (as far as they are to be collected from the report), this court would not now grant an injunction. The plaintiffs seem there to have been in possession, substantially, and infants. In the case of *Jones v. Jones*,² before Sir W. Grant (whose language at p. 173 of the report is well worthy of observation), the

¹ 8 Ves. 89.

² 1 Mer. 173.

plaintiff was out of possession, and there does not appear to have been a distinct allegation of the commission or threat of any waste or destruction. Such a case as *Mortimer v. Cottrell*, reported by Mr. Cox,¹ would, I venture to think, probably not receive, at the present day, the decision which it received in 1789. In *Pillsworth v. Hopeton*,² which occurred in 1801, the plaintiff had failed in an ejectment. In *Mitchell v. Dors*,³ in the same year, the injunction was granted. *Courthope v. Mapplesden*⁴ was in 1804, *Grey v. Duke of Northumberland*⁵ in 1809, *Thomas v. Oakley*⁶ in 1811, *Norway v. Rowe*⁷ in 1812, *Field v. Beaumont*⁸ in 1818, *Parrott v. Palmer*⁹ in 1834.

In the present case, both parties claim in effect under the same lessor or grantor; for the lease or grant under which the defendants claim was made by one Sykes, in 1804. Sykes is dead, and the grant or lease to the plaintiffs was made in 1842, by the grandson or grandsons of Sykes, claiming under Sykes, and by his title.

The question between the parties is, whether the lease or grant of 1804 has expired, or been abandoned, so as to be incapable of being now set up; the plaintiffs alleging the affirmative, the defendants the negative, of this proposition. The case seems not to have the analogy to *Sayer v. Pierce*,¹⁰ before Lord Hardwicke, which, previously to referring to that case for the present purpose, I had rather thought it to have. Lord Hardwicke there speaks of a possible injunction.

It has been argued, that, to the extent of the plaintiffs' grant or lease, they are in the same situation, and vested with the same rights against the defendants in respect of the matter in dispute, as if the plaintiffs had been their lessors. If this is so, it may possibly be unnecessary to consider those authorities which apply only to merely adverse claimants, without any privity of title. The present case may possibly, also, be substantially distinguishable from the decision¹¹ to which I referred early in the argument, pronounced by the Lord Warden of the Stannaries, with the concurrence of certain eminent judges who assisted his Royal Highness on that occasion. That the decision there was on a demurrer, and the matter before me is a motion, seems of little or no consequence. If, as I believe, it had the united authority of the Lord Chancellor and Lord Brougham, Mr. Baron Parke, and Sir James Wigram, those learned judges must have thought, that all the facts there stated by the plaintiff in his bill, or petition, if

¹ 2 Cox 205.

² 6 Ves. 51.

³ 6 Ves. 147.

⁴ 10 Ves. 290.

⁵ 17 Ves. 281.

⁶ 18 Ves. 184.

⁷ 19 Ves. 144.

⁸ 1 Swanst. 204.

⁹ 3 Myl. & K. 632.

¹⁰ 1 Ves. sen. 232.

¹¹ Vice v. Thomas, in the Court of the Stannaries, reported by Mr. Smirke.

taken as true, were insufficient to warrant any judicial interposition in his favor; and, supposing, though without saying, that all the facts stated by the present plaintiffs, in the bill before me, though taken as true, could not warrant, were the cause now at a hearing, any decree in their favor, I ought not to grant an injunction. It is observable, that the bill or petition in Vice *v.* Thomas does not appear to have prayed an injunction; at least so I understand the matter.

The defendants, who claim a right to do what they are doing, are, it is true, by working the coal, taking away the very substance of the property; which may, in a sense, be perhaps called in this case, and might in others most certainly be, waste or destruction; but, on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made available, and may therefore, in a sense perhaps, be deemed not more than taking the ordinary usufruct of the thing in dispute; nor is unskilful or unminerlike working established against the defendants to my satisfaction, nor are they said to be insolvent.

On the whole, whatever my impression may be as to the validity or invalidity of their title, and whatever I might have deemed it right to do in the absence of precedent and authority, I doubt too much of my ability to act now against the defendants on this motion, consistently with precedent and authority, to render it in my opinion fit that I should do so; especially as the defendants have been working the coal in question ever since August, 1844. The bill was filed not before 26th July, 1845. An action was commenced by the plaintiffs in February last, and discontinued; and I am not satisfied that they might not have brought their pending action to trial at these assizes, if so disposed; which circumstances are not by any means matters to be disregarded in a case or for a purpose such as the present. The Lord Chancellor can be applied to.

I have said nothing as to amending the bill and notice of motion, by asking a receiver and manager, because I have not a strong impression that I could accede even to that application in the present position of the action and question between the parties.

DAVENPORT v. DAVENPORT.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., MARCH 3, 1849.

[Reported in 7 Hare 217.]

THE bill stated a deed dated the 30th of December, 1656, whereby certain estates in the county of Chester were limited to the use of Peter Davenport, the settlor, for life, with remainder to his first, second, third, and fourth sons successively in tail male, with remainder to the right heirs of the settlor; and, after averring the death of the settlor, leaving five sons, the possession of the estates in conformity with the limitations in tail, the death of the four elder sons, and the extinction of their male issue upon the decease of one William Davenport without issue, who died in possession of the estates in April, 1829, and that none of the tenants in tail had ever done any act to destroy the estates tail, or defeat the remainders expectant thereon—alleged that the plaintiff was descended from the fifth son of the settlor, and upon the death of William Davenport became entitled to the estates under the ultimate limitation to the right heirs.

The bill alleged, that, upon the death of William Davenport, Sir Salisbury Pryce Humphreys Davenport, by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates, and continued in such possession until his death, in 1845; that, upon his death, the defendant Dame Maria Davenport, his widow, by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates, and had ever since continued in such possession.

The bill stated, that the plaintiff had not discovered his title to the said estates until within a very recent period; that, as soon as he discovered the same, he demanded possession, which the defendant had refused to deliver to him; and that, on the 10th of January, 1849, which was as soon as his circumstances would allow, he commenced an action of ejectment in the Queen's Bench, and caused a declaration in ejectment to be served upon the defendant to recover possession of the said estates, which action of ejectment stood for trial at the next Chester Assizes.

The bill alleged that the defendant threatened and intended to cut down and fell the timber and other trees standing on the said lands, and to sell the same and apply the proceeds of such sale to her own use; and that she had caused timber and other trees to be lotted and marked, and had advertised their sale by auction, at Stockport, on the 14th of February, 1850. The bill alleged that such timber and other trees were of the value of £2 000 and upwards; that the same

were very ornamental; and that irreparable injury would be done to the estates by their removal.

The bill prayed an injunction to restrain the defendant from cutting down or felling or otherwise injuring any of the timber or other trees then standing on the said estates, and from selling or otherwise disposing of the same; and that the defendant might be directed to keep an account of all moneys received by her for or on account of any timber which she might have felled or sold or otherwise disposed of.

The defendant demurred.

The *Solicitor-General* and *Mr. Hare* for the demurrer.

Mr. Bacon and *Mr. Bagshaw* for the bill.

VICE-CHANCELLOR. If this question were new, I should have no hesitation in holding, that, upon the facts stated upon the bill, the plaintiff would be entitled to the injunction. In the absence of authority my mind, in cases of actual destruction of property, would be little prepared to admit the distinction between waste and trespass in cases like the present. But the question is, whether the cases of trespass against a party in possession are not cases of a class in which the court refuses to act, until the right is established at law.

The jurisdiction of the court in cases of injunction, originally, no doubt, arose in cases of waste, where there was privity between the parties. All the earlier cases are of that description. The court began afterwards to interfere in cases of trespass; but I believe it will be found that the cases, in which the jurisdiction was exercised in restraining trespass, have been cases of this peculiar description,—the party complaining has been in possession of property, and has complained that his possession was wrongfully invaded by some alleged trespasser. The alleged trespasser, on the other hand, has not admitted the possession of the plaintiff, nor claimed a right to invade such possession as he had, nor intended to do so,—as in the case of the underground workings of adjoining mines,—and the court has distinguished these cases from ordinary cases of trespass by saying the alleged wrong-doer claimed under color of title. The cases of railway companies taking lands, under the compulsory powers given them by Parliament, are of the same class. Neither party disputes the abstract right of the other to that which he claims. The dispute is, as to the practical application of the law to the facts of the case. It has always appeared to me the court was trying to get out of a technical rule, with a view to the better protection of property.

I remember a case concerning the property of Lady Bastard, in the west of England, in which some observations on this point were made by the Lord Chancellor in the course of the argument. Persons

working mines insisted that, within a particular district, there was a right common to all miners to make drifts through private closes, for the purpose of draining the mines. This right they were about to assert by cutting a trench through some property of Lady Bastard. In that case the Lord Chancellor granted the injunction. But whether these are or are not refinements as to the claim being made under a color of right, I think no case can be found, in which,—the party out of possession coming to this court complaining that another party in possession, and insisting upon a title to that possession, is cutting down timber or doing any other act of destruction,—the court has ever granted an injunction, until the right has been established at law.

The present case, however, would not be determined if the case rested there; for the bill states, and the demurrer therefore admits, that the plaintiff is the party entitled, and that the defendant, having been in possession for nearly twenty years, claims under a pretended title. I do not, however, understand that the bill asserts that the defendant does not claim a right to the possession. Whether the defendant may or may not be eventually successful in defending the possession, I should have thought that, if such a case could exist, this ought to be one for granting an injunction, inasmuch as there is, for the present purpose, an admission upon the record that the title, whatever the result of the trial may be, is in some sense a pretended title. But I have the case of *Jones v. Jones* before me, where the question arose upon demurrer, and my difficulty is, that I cannot, in the face of that decision of Sir William Grant, take upon myself to say that I am not to apply the rule there laid down to this demurrer. I quite agree with Sir William Grant's observations, and with those of the Vice-Chancellor Knight Bruce. I cannot, however, do otherwise than say, that, if the cases are to be overruled, it must be by the Lord Chancellor.

In the case before Sir William Grant, the plaintiff alleged that the testator died intestate,—that the plaintiff was his heir-at-law, and as such had become entitled to the estate, and that certain other persons had some paper, which they called a will, not attested so as to pass the real estate. Sir William Grant said, the court never had done what was there asked; but he adds, that, at least, the party ought to state that he had used due diligence, whereas it appeared that he had waited two years. How long the plaintiff in this case has waited, I do not know. He says he had not discovered his title until very recently. What "very recently" may mean, as against a party who has been in possession for nearly twenty years, I do not know.

I cannot help expressing my surprise that the law should be in this state, but I am compelled to allow the demurrer. I must refer the plaintiff to a higher tribunal, if he thinks he can sustain the bill.

TALBOT (EARL) v. HOPE SCOTT AND OTHERS.

IN CHANCERY, BEFORE SIR WILLIAM PAGE WOOD, V. C., JANUARY 21
AND 22, 1858.

[Reported in 4 *Kay and Johnson* 96.]

THE bill, filed by Earl Talbot, claiming to be Earl of Shrewsbury, against Mr. Hope Scott, Mr. Serjeant Bellasis, Lord Edmund Howard, and others, stated, that by an act of Parliament, intituled "An act for annexing the late Duke of Shrewsbury's estate to the Earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned," being the act 6 Geo. 1, c. xxix., certain real estates were limited to the use of Gilbert Earl of Shrewsbury, George Talbot, and John Talbot of Longford, for life, with remainder to the first and other sons successively of each of them successively in tail male, and for default of such issue to the use of all and every person or persons being issue male of the body of John first Earl of Shrewsbury (who died A.D. 1453), to whom the title, honor, and dignity of Earl of Shrewsbury should, after the decease of the said Gilbert, George, and John of Longford, without issue male of their respective bodies, by virtue of the letters patent of the creation of the Earldom, descend and come severally and successively one after another, as they and every of them should succeed to and inherit the said Earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said Earldom, and to be annexed to and descend with the same. This act contained clauses prohibiting alienation of any of the premises by Gilbert, George, and John of Longford, or the heirs male of their bodies, and declaring every such alienation to be void, but with a proviso that such of them as should be and continue Protestants as therein mentioned, should not be disabled while continuing Protestants from alienating the premises.

The bill further stated, that, by acts 43 Geo. 3, c. xl., and 6 & 7 Vict. c. xxviii., parts of the estates so settled by the act 6 Geo. 1, in the counties of Salop, Berks, Wilts, Oxford, Chester, Worcester, and Stafford, were vested in trustees, now represented by the defendants, Mr. Hope Scott and Mr. Serjeant Bellasis, upon trust, to sell and to lay out the moneys to arise by such sale in the purchase of other

lands and hereditaments to be settled in lieu thereof to the same uses, and subject to the same restrictions; and that, by the 32d section of the last of these acts (6 & 7 Vict. c. xxviii.), the proviso in the act 6 Geo. 1, in reference to alienation by such of the persons therein mentioned as should be and continue Protestants, was repealed.

The bill stated that divers of the lands authorized by the acts 43 Geo. 3, and 6 & 7 Vict. to be sold, were sold and conveyed to the purchasers, and other lands were purchased with the moneys arising from such sales, and were conveyed and settled as directed by those acts.

The bill then averred, that Gilbert Earl of Shrewsbury, and John Talbot of Longford, both died without issue, in 1743; that George Talbot died in 1733, and that all his issue male (twenty persons in number), was now spent; the last of them to whom the Earldom of Shrewsbury had descended, Bertram Arthur, 17th Earl, having died without issue in August, 1856; that the Earldom of Shrewsbury was created by letters patent, dated A.D. 1442, in the person of John Baron Talbot, to hold the same to him and the heirs male of his body; and that on the death of Bertram Arthur, the 17th Earl, the plaintiff was heir male of John Baron Talbot; and the bill then proceeded to trace the plaintiff's heirship through eighty-six persons, averring all the facts necessary to establish it through every link of the alleged pedigree.

The bill charged that the plaintiff, as the heir male of John first Earl of Shrewsbury, was entitled to succeed to the title, dignity, and peerage of Earl of Shrewsbury; and then proceeded to state, that, on the 20th of February, 1857, he had presented a petition to her Majesty, praying that the same might be declared and adjudged to belong to him, and for a writ of summons to Parliament accordingly; that such petition, with the report of the Attorney-General thereon, had been referred to the House of Peers on the 9th of May, 1857; and the House of Peers, on the 11th of May, 1857, had referred the same to a Committee of Privileges to consider and report thereon; that the Committee of Privileges met on the 13th of July, and continued to sit at intervals till the 14th of August, 1857; and in the course of such sitting counsel were heard in support of the plaintiff's claim, and in opposition thereto, on the part of the Duke of Norfolk, acting as guardian to his infant son the defendant Lord Edmund Howard, in whose favor the late Earl of Shrewsbury had devised or attempted to devise the estates annexed to the title by the act 6 Geo. 1, the defendants Mr. Hope Scott and Mr. Serjeant Bellasis being the devisees in trust for Lord Edmund Howard; that the Attorney-General appeared on behalf of the Crown, and counsel were also

heard on behalf of the defendants, Princess Doria Pamphili and the Duchess of Sora, a daughter and granddaughter of John late Earl of Shrewsbury, against the claim of the plaintiff; that the counsel who appeared for the Duke of Norfolk, as guardian for his infant son, urged as an argument in support of his right to appear in opposition to the plaintiff's claim to the Earldom, that the decision of the committee on such claim would also decide the right to the estates annexed to the Earldom by the act; and the Duke was on that ground allowed to appear by counsel for his infant son in opposition thereto. The bill then contained statements to the effect, that, in the course of the proceedings before the Committee of Privileges, it appeared that there were only three links in the pedigree which it became necessary for the plaintiff to prove in order to establish his claim; and that, upon two of them, the Lord Chancellor had expressed an opinion in his favor; and that after hearing the Attorney-General on the whole case, the committee had adjourned, on the 14th of August, 1857, to consider the evidence: and the case now stood adjourned accordingly.

The bill then charged, that, by virtue of the acts of Parliament above mentioned, the plaintiff became, on the death of the late Earl, and was now, entitled as tenant in tail in possession to the settled estates, as inseparably annexed by those acts to the Earldom, including therein the hereditaments settled by the act 6 Geo. 1, excepting such hereditaments as by the 43 Geo. 3, and 6 & 7 Vict. were vested in trustees, but including therein all hereditaments purchased pursuant to the two last-mentioned acts; and that the plaintiff was also entitled to the rents, issues, and profits of the hereditaments, which, by the two last-mentioned acts, were vested in trustees for sale, but which had not been yet sold; but that, in the years 1855 and 1856, the late Earl had executed two deeds purporting to disentail all the property in question, and subsequently by his will had purported to devise the same to the defendants, Mr. Hope Scott and Mr. Serjeant Bellasis, for the term of 1,000 years, and subject thereto to uses in strict settlement; under which Lord Edmund was first tenant for life, with remainders over; and the trustees were thereby empowered, during the minority of any person entitled in possession to the premises, to continue in possession of the premises, and in the management thereof, and out of the rents to pay the expenses of management, and provide for the maintenance and education of such minor, and to invest the residue for his benefit.

The bill then stated, that, upon the death of the late Earl, the plaintiff was abroad, residing in Italy, and the defendants, Hope Scott and Bellasis, by favor of some of the tenants of the settled es-

tates, entered into the receipts of the rents and profits of the greater part of the settled estates, and they notified to all the tenants of all the settled estates that they were entitled to receive all the rents of all the settled estates; and the plaintiff by his agent notified to all the tenants that he was entitled to receive all the rents of all the settled estates; but the plaintiff was not and had not been in possession of any of the rents of the estates or any part thereof, none of the tenants having consented to acknowledge the title of the plaintiff or to pay him rent; that, by reason of such entry and claim by the last-named defendants, the plaintiff had been prevented from receiving the rents of the settled estates; and the same defendants had received a large portion thereof; and they were in receipt of rents amounting to upwards of £25,000 per annum, and had actually received rents to more than that amount. The annual rent of the settled estates was averred by the bill to amount to £35,000 and upwards.

The bill also charged, that many of the tenants of divers parts of the settled estates had, by reason of the conflicting claims to the Earldom, refused to pay their rents to either the plaintiff or the defendants, and by reason thereof rents to a large amount, and exceeding £5,000 per annum, were in jeopardy and in danger of being lost; and that some of the tenants who so refused to pay their rents were very poor.

It also charged, that the same defendants had cut down considerable quantities of timber on the estates, and that some of it was of an ornamental character, and some of it was not ripe for cutting, and they had sold the same, and received the proceeds thereof; and they threatened and intended to cut more timber growing on the estates, to the great injury and detriment thereof; and they were then cutting down timber growing on part of the settled estates at Alton, in the county of Stafford.

The bill concluded with charging, that the late Earl had died during the recess of Parliament, which did not meet till the 3d of February, 1857, immediately after which the plaintiff had presented his petition to the Queen; and, ever since the reference to the Committee of Privileges, the plaintiff had been diligent in laying before the Committee the evidence of his claim; and that the plaintiff was willing to undertake to use all diligence in prosecuting his claim before the committee, and, on his claim to the Earldom being established, to proceed forthwith by ejectment to recover possession of the settled estates.

The bill prayed, that, pending the plaintiff's proceedings to establish his claim to the Earldom, and his proceeding by ejectment, some proper person might be appointed to receive the rents and profits accrued

due since the decease of the late Earl, or thereafter to accrue due in respect of the estates settled by the act 6 Geo. 1, and of the estates added or to be added thereto pursuant to the acts 43 Geo. 3 and 6 & 7 Vict., except such parts as had been sold pursuant to the two last-mentioned acts; that the deeds and documents might be secured pending the suit; that an account might be taken of the rents and profits received by the defendants Hope Scott and Bellasis, or either of them; and that the same might be ordered to be paid into court, to be there secured for the benefit of the plaintiff or the person or persons who should be found entitled to the same; that an account might be taken of the timber cut down by the defendants and of the proceeds thereof; and that the same might be ordered to be paid into court to be secured for the benefit of the plaintiff or the person or persons who should be found to be entitled to the same; and that, pending the proceedings aforesaid, the defendants might be restrained by injunction from cutting any timber or trees being or growing on the premises, and from committing any waste thereon, and from receiving any of the rents, and from interfering with any of the tenants of the same hereditaments.

To so much of the bill as sought relief in respect of the settled estates, the defendant Hope Scott demurred; to the rest of the bill he pleaded that the plaintiff was not Earl of Shrewsbury.

The defendant Bellasis put in a similar plea to the whole of the bill.

Each of these defendants put in a voluntary answer in support of his plea, traversing such averments in the bill in support of the plaintiff's pedigree as he believed to be unfounded.

Mr. James, Q. C., Mr. Cairns, Q. C., and Mr. C. Hall, for the defendants Mr. Hope Scott and Mr. Serjeant Bellasis, in support of the demurrer and plea.

Mr. Rolt, Q. C., and Mr. Shapter, Q. C., for the plaintiff.

VICE-CHANCELLOR SIR W. PAGE WOOD. This demurrer and plea must be allowed.

I have not examined all the cases which were cited yesterday, but I have referred to one which is a most valuable repertory of all the authorities on the subject. That is the case of *Haigh v. Jaggar*,¹ in which Lord Justice Knight Bruce, when Vice-Chancellor, expressed a strong opinion that the arm of this court is long enough to reach clear cases of destructive waste, even where the party committing such waste is in possession, and the party seeking to restrain the acts of waste is out of possession and his title is denied by the defendant. That I conceive to be the conclusion to which the authorities lead,

¹ 2 Coll. 231.

though there has been some difficulty in arriving at such a conclusion, and it has only been arrived at by degrees, and it was necessary in order to establish it, to hold that several of the earlier cases would not now be decided as they actually were.

That was clearly the result of the authorities referred to in the case of *Haigh v. Jaggar*, and there the Vice-Chancellor says: "I am not convinced that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts."¹ He then proceeds to say that one of the most remarkable cases was that of *Smith v. Collyer*,² before Lord Eldon, as to which he makes the observation, that he is not perfectly satisfied, that, in the same circumstances as occurred there, the court would not now grant an injunction, adding, "The plaintiffs seem there to have been in possession, substantially, and infants." Then he proceeds to enumerate the authorities; and to those authorities I have been indebted, to a great extent, in forming my opinion upon the subject.

As regards the demurrer, it relates solely to the settled estates. The settled estates are estates, which, by an act passed in the reign of George the First, are now the property of such person, if any such there be, who shall eventually establish that he is Earl of Shrewsbury, and in lineal descent from the first Earl. The plaintiff avers by his bill, that he is that person. At the same time, he states that his title is in question; that proceedings have been taken to establish it before the House of Lords; and that he has very nearly arrived at a satisfactory establishment of his title, there being only three points which appear to be in any way hostile to the conclusion at which he has sought to persuade the House to arrive; and with regard to two of those points, he avers, that some members of that august body have expressed an opinion in his favor.

In that state of things, he says, I find two of the defendants, Mr. Hope Scott and Mr. Serjeant Bellasis, in possession of my property under the following circumstances: Notwithstanding an act expressly prohibiting any alienation by the several persons who shall come into possession of the property as there mentioned, including the last Earl

¹ Id. 235.

² 8 Ves. 89.

(the act contained an exception in favor of alienation by any Protestant Earl, but that exception was repealed by a subsequent act of the Queen), the last Earl took upon himself to execute certain instruments purporting to be disentailing deeds, and a will purporting to devise the property to the defendants; and immediately upon his decease the defendants, on behalf of themselves and Lord Edmund Howard, who claims to be interested under the will, claimed, and they still claim, to be entitled to all the said settled estates or moneys, by virtue of the two deeds that were so executed by the last Earl.

The bill states, that the defendants, Mr. Hope Scott and Mr. Serjeant Bellasis, rest their claim upon that ground; but in another passage of the bill, I find it stated, that their *cestui que trust* Lord Edmund Howard claimed, and his counsel rested his claim to be heard upon the question of the peerage before the House of Lords, upon the ground that the question as to the peerage would in effect decide the question as to the property. Upon that footing he presented himself before the House of Lords; and upon that footing, as the bill avers, he was allowed to appear before that House. Whether that averment be correct, is disputed; but, of course, I must take it to be so on demurrer; and according to that averment, there is, at all events, a color of claim in Lord Edmund, and I cannot look upon his claim as a groundless assertion of title by a total stranger.

Then the bill states, that, upon the death of the late Earl, the defendants, Mr. Hope Scott and Mr. Serjeant Bellasis, professing to act as trustees under his will, by favor of some of the tenants of the settled estates entered into the receipt of the rents and profits of the greater part of the settled estates; and they notified to all the tenants of all the settled estates, that they were entitled to receive all the rents of the settled estates. I notice this, because it may be important to do so. The bill does not state that they entered into territorial occupation of these lands by favor of the tenants, but it simply states that they entered into the receipt of the rents and profits (no doubt by the favor of the tenants) of all the settled estates.

I ought, perhaps, now to mention, that this is not a general charge as to the whole property. There is a further and different part of the bill, to which the plea applies. There are certain other estates which, as the bill avers, are vested in the same two defendants, upon trust for whoever may eventually be held to be entitled to the Earldom, such estates being in a different position from the settled estates, in which the legal interest solely is in question. To that portion of the bill a plea is put in, that the plaintiff is not the Earl of Shrewsbury, and is not a descendant of the first Earl. The charge,

therefore, as to entering into possession of the rents is confined apparently to the settled estates.

Then the charge as to timber avers generally, "that the last-named defendants have cut down considerable quantities of timber on the said estates, and some of it is of an ornamental character"—(not alleging that it is timber that was planted or left standing for ornament—not leading, therefore, to any conclusion that the defendants have committed equitable waste), "and some of it was not ripe for cutting; and they have sold the same and received the proceeds thereof; and they threaten, and intend, to cut more timber growing on the said estates, to the great injury and detriment thereof: and they are now cutting down timber growing on part of the said settled estates at Alton, in the county of Stafford."

Then the bill prays [His Honor read the prayer¹].

With regard to the first part of the relief prayed by the bill, namely, the receiver, which is really the substantial part of the case, I apprehend, that, as to the settled estates, it is too clear for any contention at the present day, that this court will not interfere at the instance of a person alleging a merely legal title in himself against other persons in possession of the estates, to grant a receiver and put them out of possession. In *Lord Fingal v. Blake*,² and in the subsequent case of *Lloyd v. Lord Trimleston*,³ there are some observations of Sir A. Hart, which seem to have a leaning in favor of such interference, and to which I shall refer presently; but there is no decision which in the least bears out the proposition that the court will interfere under such circumstances; for it is manifest, that, in the first of these cases, the receiver was granted by consent. That there may be a possible case in which this court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed if no steps were taken, I can understand; but I have found nothing that bears any resemblance to the doctrine contended for, that, at the instance of a person alleging a mere legal title, this court will interfere against another who is in possession, to deprive him of that possession. I have known, and everybody must have known, numerous instances where ejection has been brought for very valuable property upon a merely legal title; yet I think I may say, that for the last twenty years, if not for longer, no one has ever dreamt of approaching this court, however heavy the litigation between the parties, for the purpose of obtaining a receiver, until he had established his right at law to possession of the estates.

The ground of the rule adopted by the court in this respect I conceive to be extremely sound: the general ground being, that the

¹ *Supra*, p. 580.

² *2 Moll.* 78.

³ *Id.* 81.

court cannot interfere with a legal title of any description unless there be some equity by which it can affect the conscience of the defendant. Where there is an entire want of privity between the plaintiff and the defendant, and the defendant is simply a wrong-doer at law, this court does not take upon itself to interpose, unless in certain very exceptional cases.

One such exceptional case is that of destructive trespass against property of which another is in possession; a mere trespasser comes upon property as to which he recognizes your right to possession, and invades that property either by mining or by cutting down timber without a color or shadow or pretence of title, and the property may be destroyed before you can arrest his proceedings at law. But even that was not recognized as a case for the interference of the court until after a considerable struggle in the mind of Lord Thurlow, who, I believe, is to be considered as having established the doctrine that in such a case the action of the court may be safely invoked, nor until he himself had several times refused to act under such circumstances.

Subject to these exceptional cases, the rule is as I have stated. As regards the enjoyment of the ordinary rents and profits of an estate, this court has never assumed a right to interfere with that title, which the law confers upon every terre-tenant in possession of real property,—a title to be traced, no doubt, to the feudal doctrines of our law, by which the lord had a right to require that he should always be able to know his tenant; possession on the part of the tenant was the best means of affording to the lord that knowledge; and the tenant who owed duties to his lord (and very onerous those duties were at the period when the feudal law was in its full vigor), had a right to all the benefit of the property in respect of which he was bound to perform such duties. The title by possession has been always treated by the law as so sacred that it is well known to many of us from the cases to be found in the books and otherwise, that some estates in this kingdom are held without the least pretence of any other title. Many estates have been originally entered upon simply under a devise from a mere tenant for life, proved most satisfactorily to be merely tenant for life; and yet, upon the ground that the court recognizes the person in possession as the owner till some other person by a stronger title has cast him out, unless it can find something in the shape of fraud, which was the case in *Huguenin v. Baseley*,¹ something by which it can fasten upon the conscience of the person so in possession, the court invariably refuses to interfere.

But although I do not find any case in which this court has actually

¹ 14 Ves. 273.

interfered under such circumstances, I do find observations, which certainly appear to have some leaning in favor of interference, attributed to a very eminent judge of long experience in the practice and principles of this court, Sir Anthony Hart, when Lord Chancellor of Ireland, in the case of *Lord Fingal v. Blake*,¹ and the following case of *Lloyd v. Lord Trimleston*.²

The case of *Lord Fingal v. Blake* was this: first, there was an application before action brought, which was refused. Then, after action brought, some discussion took place, and at last there was an arrangement by consent, and a receiver was appointed, and all the subsequent proceedings took place after that consent had been given. Then a further application was made after the result of the trial and the several other proceedings had in the cause. That being the position in which the matter stood, Sir Anthony Hart says, on the last application that came before him, “What I propose to do is only a temporary interference as to the possession of the estate; and I think it is in conformity with the principles of this court to direct not only an account of the rents received by the heir, and of the produce of the timber cut down by him, but also to direct a receiver to take the possession. The stress of the argument has gone upon the supposed imperfection of *Lord Fingal’s* title, as beneficially entitled to take in the contingency of the failure of the precedent estate. But I put *Lord Fingal’s* beneficial title out of the question. The argument by Mr. Holmes has put it most strongly, that there is no devise of the real estate, that there is a pure intestacy as to the seisin of the real estate, and that the effect of the devise extends only to an equitable obligation on the legal estate in the hands of the heir. If this were so, if there was no devise away from the heir, if the inheritance were now devolved upon the defendant, the heir-at-law, I certainly should ponder long before taking it away from him. But I am of opinion the real estate is devised away from the heir. It is admitted on all hands, this will is sufficient in form if sufficiently expressed; and I cannot see how it can be doubted that the whole real estate has been given to the trustees, although there may be indeed a question whether the estate so given to the trustees is temporary or perpetual.”³ Then after going through the language of the will, he says: “The consequence of this is, that, inverting the argument used, the heir was a wrong-doer from the beginning, and he is not to put the devisees to recover the estate by ejectment while the court has the control to direct the possession. . . . If indeed the heir took by descent, the court would look at his rights with great deliberation, and not without apprehension would it dispossess him of the legal

¹ 2 Moll. 50.

² Id. 81.

³ 2 Moll. 74, 75.

possession; but here the heir has no legal possession, but his title is only worked out by showing either that the trustees took only a chattel interest, of which the purposes have been answered, or that there is no valid subsisting devise to them whatsoever. The former can only be shown to the court by the Master's finding; and in the meantime the court must take care of the issues and profits of the land." Then he says, if "the limitations were palpably too remote or clearly uncertain," he should not be disposed to interfere.¹

All that is in favor of non-interference in a case where there is any legal possession or right in the heir; and the result is, that in that case I do not find anything to support Lord Talbot's contention.

In *Lloyd v. Lord Trimleston*,² there was an observation which seemed more nearly applicable to one of the charges in this bill. There the suit was instituted by Lady Trimleston, claiming as devisee under her husband's will, to have his will established. Upon the death of Lord Trimleston in 1813, she had continued in possession of the mansion-house and obtained possession of lands from the tenants; and the heir-at-law, being unable to change the possession, prevailed upon the trustees under a prior deed, made in 1810, to use their legal estate for that purpose. They accordingly brought their ejectment; and in 1820, Lady Trimleston was evicted, and the then Lord Trimleston, or his son the Hon. Thomas Barnewall, was let into possession of the mansion-house at a nominal rent. Lady Trimleston filed her bill claiming as devisee for life, and a motion was made for a receiver. The Lord Chancellor said, "The substantial injury would be, if there was danger that the fund might be lost by the insolvency of the trustees. If there is no want of substance in the trustees to make good what they have received, or without wilful default might have received and may hereafter receive, since they entered into the possession, no ultimate injury will be done. The result of the proceedings at law, touching the will is, that at present a verdict stands against the will. Then Lord Trimleston, being the heir-at-law, and the only verdict existing being against the will, has, I think, a title to be in possession."³ So far, I find no difficulty. The case was one of the clearest cases imaginable. The heir had availed himself of an outstanding interest in trustees, and a verdict had been obtained against the plaintiff. The attempt was to oust the heir of the possession that he had so got by a person as against whom at present the title had been determined. But then Sir Anthony Hart makes this observation, upon which a great deal of stress was laid during the argument: "The possession which was acquired by the devisee had not the quality of an authorized possession. On the death of the ancestor the heir has title

¹ Id. 76, 77.

² 2 Moll. 81.

³ Id. 83.

to enter and retain possession until the court interposes. If it be said that the devisee, being let into the possession by the favor of the occupiers, acquires any right, that would be to adjust the possession according to the will and pleasure of mere casual persons who happened to be the occupying tenants at the death of the testator. But my opinion of the law is this, that the heir has upon the instant of the death of his ancestor in possession a right to enter and to turn out by the shoulders any other person, except only the widow, who has a right to stay until her dower is assigned to her."¹

Now I have a little difficulty, I candidly confess, in comprehending that observation. If it was meant to apply to anything more than a fraudulent occupation or possession,—if it was meant to apply to the case of a fair contest between a devisee and the heir, the devisee being more fortunate in getting the tenants to attorn to him than the heir, I cannot understand it; for it does not seem to be law to say that the devisee, being let into possession by favor of the tenants, does not acquire any right. Unquestionably, he does acquire a very substantial right. If the devisee obtains possession of the estate by the tenants attorning to him, he holds the estate till some other person can show that he, as heir, or otherwise, has a better right to possession. It seems to me, that the observations of the Lord Chancellor must have been meant to apply to some case of fraudulent or forcible possession, which the law will not recognize; because he speaks of the heir having a right to enter and "turn out" the devisee "by the shoulders."

[*Mr. James.* There the devisee, Lady Trimleston, had obtained possession by favor of the tenants, and then complained that the heir-at-law had got the trustees to use their legal estate to evict her.]

The VICE-CHANCELLOR. So I observe. The Lord Chancellor said, the devisee had no better right in any way. In truth she had not the legal estate, and those who had the legal estate had used it against her, and in favor of the heir; and the heir having obtained a verdict, the Lord Chancellor thought, justly and properly, it was not a case in which he could interfere. Sir Anthony Hart was much too great a judge to mean—and it is manifest, from what he says in the subsequent passage as to the right of the heir to enter and turn out the devisee by the shoulders, that he did not mean—to apply the observation I have read to such a possession, on the part of the devisee, as would put the heir to legal process for the recovery of his right. He could not have meant such a possession as that of the defendants to this bill:—a possession by persons claiming a right, and who, by favor of the tenants, and by getting the tenants to attorn

¹ 2 Moll. 83.

to them, have entered into the receipt of the rents and profits. That is a possession, which, I apprehend, it would be found extremely difficult to dispute, except by ejectment. I know of no process by which such a person could be turned out by the shoulders, or dealt with in any way except by formal proceedings in a court of law.

Considerable inconvenience may be occasioned in this as in many other cases, in consequence of the rule which the law has thus adopted, out of respect to title by possession;—indeed, the law goes further, for if the tenant without attorning to any one chooses to hold adversely for his own benefit, until the possession is converted by lapse of time into an absolute interest, he is allowed to take his chance of remaining undisturbed until a better title is established. But whatever inconvenience may be the consequence, I find nothing in the observations of Sir Anthony Hart, or elsewhere, to justify interference upon that ground. I find nothing in the allegations in this bill that I can treat as stating a fraudulent collusion between the defendants and the tenants. The bill alleges expressly, that “the defendants notified to all the tenants of all the settled estates, that they were entitled to receive all the rents of all the settled estates”; that is to say, by virtue of their alleged right under the will, they notified to all the tenants that they were entitled to receive all the rents; and some of the tenants adopted that view and attorned to them. I cannot read that passage as amounting to any case of fraud which would justify the court in interfering. There is not a single authority in the books for the appointment of a receiver for a person out of possession, against a person in possession, the person out of possession simply alleging a legal title, nor can any shadow of a dictum be found to support such a view. And if authorities to the contrary are less numerous of late years, it is because attempts of this kind have of late years been less frequent than they were formerly.

With regard to the large amount at stake, I apprehend that makes no difference in the principle upon which the case is to be decided. That principle is the same whether the rental be, as here, £35,000, or only £2,000 or £3,000 a year. And with regard to the argument that irremediable injury will be occasioned in the loss of the rents and profits in case a receiver is not appointed, I think there is the same injury done in a vast number of cases from interfering with the rents and profits against a person having legal possession. To deprive him of that possession may cause him irreparable injury. All his arrangements in bringing up his family may be interfered with. The court may be inflicting as much injury by granting a receiver, as by withholding it. And the result is, that I can neither find any semblance of authority, nor can I conceive of any rational ground upon princi-

ple, for holding that where one person is in possession of the rents and profits, claiming to be the holder by a simple legal title, and another person claims to hold by a like legal title, the former can be ousted in this court, until that legal title has been finally determined at law.

The next point, before coming to the question as to the timber,—and it is one upon which some reliance was placed in argument,—is the charge in the bill that there are rents to the extent of £5,000 a year arising from certain estates, the tenants of which have not attorned to either of the claimants. The answer to that part of the case is, that here again the plaintiff is standing on his legal title. He does not tell the court that he has taken any proceedings against the tenants in question. He cannot at present assume that the tenants will not pay him in the event of his taking such proceedings; and it is clear, that, if he took such proceedings against any tenant, he would either recover the rent, or the tenant would file his bill of interpleader.

This leads me to notice the argument that the present bill is, in truth, no more than a consolidation of several bills of interpleader, and that, if the court interferes upon a bill of interpleader, the same interference ought to take place at the instance of one of the litigant parties. But the principle is as different as can be conceived. The court acts upon bills of interpleader, because a tenant, who is perfectly innocent, and who cares nothing about the dispute between two claimants, is left in uncertainty, upon the death of his landlord, as to who is his new landlord. He is willing to recognize fully the title of the new landlord whenever he is ascertained. But A says, he is the late landlord's heir or devisee, and the person entitled to sue the tenant for rent; and B says the same. The difficulty has been caused not by the tenant, but by the deceased landlord having devised the property, by uncertainty who is heir, or the like. There are two persons claiming; the tenant knows nothing of either; he only desires to be discharged. That the tenant under such circumstances should be indemnified and saved harmless is manifest equity; and the tenant, therefore, has his right to interpleader. But how has that any bearing whatever upon the right here claimed by the plaintiff, for one of the claimants who is out of possession to come here and oust, in effect, by means of a receiver, the other claimant, who has been more fortunate in obtaining possession, and with it the legal right which possession gives?

To return, however, to the charge as to the rents payable by tenants who have not attorned to either party, and the danger of those rents being lost: it does not appear to me that there is any necessity for those rents being lost. They will be recovered either by the plaintiff bringing actions for them against the tenants, and the ten-

ants paying them when the plaintiff has brought those actions; or, if the tenants do not pay them in those actions, they will take care, for their own sake, to pay them here. One of these two things they must do; and whichever course they take, the rents will be paid, and the plaintiff will have his full and effectual remedy.

The part of the case which relates to the timber is really the only part of it that can occasion any difficulty or hesitation. With regard to the timber, the authorities certainly are exceedingly strong against the right to any relief upon a bill of this description, even where the bill contains strong averments of waste by the defendant, that defendant being a person in possession and claiming under a legal title. At the same time, there are authorities looking the other way; and there is not only upon this point the observation of Sir Anthony Hart, to whom, as I have said, every deference is to be paid for his knowledge both of the principles and practice of the court, but there are also the authorities enumerated by Vice-Chancellor Knight Bruce, in his judgment in *Haigh v. Jaggar*,¹ and which, no doubt, were the very authorities present to the mind of Sir Anthony Hart, besides many other cases with which he had become acquainted in his long experience, and which might not have found their way into the books.

In looking through those authorities it is easy to see that there has been some fluctuation as to whether relief should be given even in a plain and manifest case of this description, where A, being in possession of a close, and his possession being undisputed, a mere trespasser comes underground to take his mines, or enters above-ground by collusion with the tenant (and he could not enter except by collusion with the tenant), and removes a part of the substance of the inheritance, be it timber or be it mineral.

At first, Lord Thurlow refused relief even under such circumstances; but afterwards (as Lord Eldon notices in numerous cases) Lord Thurlow changed his mind, and considered that relief ought to be given. Perhaps the best instance of that is a case in which both processes took place in Lord Thurlow's mind, viz., an inclination in the first instance strongly in favor of the legal title, and then a change afterwards, upon the ground that there might be equitable circumstances affecting the conscience of the defendant, which would entitle the court to interfere. That is the case of *Hamilton v. Worsefold*, published in a note to *Courthope v. Mapplesden*,² as shortly stated from a note by Sir Samuel Romilly: "The bill stated that the plaintiff was seised in fee, that his title had but recently accrued, and the tenants had not yet paid him any rent; that the defendant Worse-

¹ 2 Coll. 236.

² 10 Ves. 290.

fold pretended to have some claim to the estate, and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other defendants, the tenants"—(so that there is a difference between that case and the case before me; for here the bill alleges simply the receipt of the rents and profits by favor of the tenants; not, as in *Hamilton v. Worsefold*, an entry upon the material property with the permission of the tenants, who were entitled of course to keep the defendant out of possession)—“and had cut timber, and threatened to cut more. The bill therefore prayed that Worsefold might be restrained from committing waste, and that the tenants might be restrained from permitting it.”—(It is clear that the plaintiff's case was not simply that Worsefold had got the rents and profits from the tenants, but that there was actual collusion between the tenants and the defendant; and that, by means of such collusion, and by aid of the tenants, the defendant was admitted into possession and committed the waste, and the tenants were made co-defendants.)—“The Lord Chancellor, upon the motion for the injunction, at first had some difficulty about granting it, Worsefold being a mere trespasser; but at length his Lordship granted the injunction against both Worsefold and the tenants.”

In *Courthope v. Mapplesden*,¹ in which that case was cited, the plaintiff charged the defendant with entering and committing waste by collusion with the tenant; and Lord Eldon said: “I have no difficulty in granting the injunction in this case, but I will not be bound as to what is to be done upon a mere trespass, though it is strange that there cannot be an injunction in that case to prevent irreparable mischief, the rather as there is a writ at common law,” (that is the writ of estrepement referred to by Vice-Chancellor Knight Bruce in *Haigh v. Jaggar*,² and which is now abolished), “to prevent the further commission of waste during the trial; whereas, if the court will not interfere against a trespasser, he may go on by repeated acts of damage perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases, the tenant colluding; and if the tenant's act is waste the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction.”

Of all the cases to be found in the books, that is the one which has gone the farthest as to the interference of the court; it does not appear there, so far as I can see, that the tenant was made a co-defendant; so that it goes one step further than the case of *Hamilton v. Worsefold*; but the charge was the same, that it was by collusion with the tenant, and Lord Eldon, carefully guarding himself against a mere

¹ 10 Ves. 290.

² 2 Coll. 235.

trespass, says, "The tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction." To that length the court seems to have proceeded, but no further, as far, at least, as the authority of that case extends.

There are numerous instances in which Lord Eldon adverted, as he did there, to the difficulty of interfering in a case of mere trespass. Perhaps the strongest instance of that kind was that of *Smith v. Collyer*,¹ in reference to which Vice-Chancellor Knight Bruce, in *Haigh v. Jaggar*,² makes this observation: "I am not perfectly satisfied that in the same circumstances (as far as they are to be collected from the report), this court would not now grant an injunction. The plaintiffs seem there to have been in possession, substantially, and infants." In that case there was an outstanding mortgage, which, as I presume from the view taken by the Vice-Chancellor, he conceived to be held for the infant plaintiffs, so that the possession of the mortgagee was substantially a possession in the infants; and the defendant, who was cutting down timber in virtue of his alleged right as heir, was out of possession, and had no legal interest that could properly have been said to be interfered with had the injunction been granted. That only shows how strong the view of the Vice-Chancellor was as to the necessity for this court to take care not to interfere to prevent the wrongful acts of a mere wrong-doer in cases where there are no such special circumstances to justify its interference.

Again, in *Norway v. Rowe*,³ which is another of the cases referred to in *Haigh v. Jaggar*, Lord Eldon alludes to the same sort of distinction. He says,⁴ "I recollect hearing either from Lord Thurlow or Lord Bathurst, that if the bill contained a passage, which is frequently inserted now, that the defendant pretends the plaintiff is not entitled to the estate, he stated himself out of court. There was another case where the defendant to a bill to restrain waste, stated that he was in possession of the estate by a title of his own, admitting that he was let into possession by the plaintiff's tenant without his knowledge: the court said, that being a breach of the tenant's duty to his landlord, the defendant's title was for this purpose to be taken as no better than the tenant's; and though, if the defendant had obtained possession without participating in that breach of the tenant's duty, the court would not have interfered, they would not permit him to avail himself of a possession so obtained; and upon that ground he was restrained."

There are clear cases, in which there being a landlord and tenant, the landlord being the person who has made an actual demise, and the tenant, in clear breach of his duty to that landlord to whom he owes

¹ 8 Ves. 89.

² 2 Coll. 236.

³ 19 Ves. 144.

⁴ Id. 154.

allegiance, having admitted a stranger, the court says that the stranger's act is to be the act of the tenant, or, as Lord Eldon says, is to "have the quality of the tenant's act." The strongest case possible in that respect is that of *Hamilton v. Worsefold*, as there the plaintiff stated that he was not yet in possession, the tenants had not paid him any rent, and his title had only recently accrued; that case is more like this than the case of a mere demise by a living landlord, from whom the tenant took his demise and against whom it was a flagrant breach of the tenant's duty to admit anybody into possession.

These being the only authorities I can find, except the case of *Haigh v. Jaggar*, for saying that the court will in such irreparable cases interfere, I come to the case of *Haigh v. Jaggar* itself, which is rather a summary of those authorities, and where the Vice-Chancellor simply says, that he is not convinced, that, where a man is in possession, however full and complete, of an estate, and swears by his answer that his own title is just and valid, and that his adversary's title is unjust and invalid, that case "does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts."

I apprehend that the utmost extent to which that observation of the Vice-Chancellor goes as deduced from the authorities, is, that he was not satisfied that there may not be such flagrant acts of what the court calls, in some instances, malicious waste,—acts which no man, as mere owner in ordinary possession of the property would do, but indicating on the face of them fraud, in which the court could not interfere. For instance, a man says, "I know I am in adverse possession, I know there are people litigating with me and claiming this estate against me, and I know they are likely to succeed; and I will take care when they come they shall find the estate a desert. I will cut down every tree on the estate, and I will pull down the mansion-house." I am not prepared to say, any more than the Vice-Chancellor, that such a case as that would not be fraud; or that, in such a case, the court, if it once arrives at fraud, would not be strong enough to interfere, and prevent such acts from being perpetrated.

The Vice-Chancellor then says, "In the case of *Jones v. Jones*, before Sir William Grant (whose language at page 173 of the report is well worthy of observation)—and which I will come to presently—"the plaintiff was out of possession, and there does not appear to have been a distinct allegation of the commission or threat of any waste or destruction." (It appears now, by a note to the report of *Davenport v. Davenport*,¹ that the bill in *Jones v. Jones* contained a distinct and

¹ 7 Hare 219, n. (b).

positive allegation of waste.) “Such a case as Mortimer *v.* Cottrell, reported by Mr. Cox,¹ would, I venture to think, probably not receive at the present day the decision which it received in 1789.” Then he refers to several other cases, all of which I have examined, one or two of them being only the common cases of application to restrain the working of mines; but the rest having all a more pointed bearing upon the subject which the Vice-Chancellor was discussing. He refers also to Vice *v.* Thomas,² in the Stannaries Court, where a demurrer was allowed to a petition heard before the Prince Consort as Lord Warden of the Stannaries, assisted by Lord Brougham and Mr. Baron Parke, upon the ground of the remedy being at law. The Vice-Chancellor remarks, that the petition only asked for a decree for an account; and so far the case would be important as bearing upon the first branch of this case, viz., the receivership. It would not have a bearing as to the question of waste, because I do not observe—and I have looked at the full report of the case by Mr. Smirke,—that any inquiry was there asked for; all that was asked for was an account of the minerals sold.

And now, having regard to the authority of Vice-Chancellor Knight Bruce, I will look to the case of Jones *v.* Jones,³ and see what the effect of that case must be upon the present application of Lord Talbot. The case of Jones *v.* Jones came before Sir William Grant, who unquestionably must be taken to have been perfectly well acquainted with all the authorities before Lord Thurlow, and the authorities before Lord Eldon; and the observations that had been made both by Lord Thurlow and Lord Eldon, upon this particular class of cases. And in Jones *v.* Jones the bill stated that William Jones, deceased, was at the time of his death seised of large estates; that he died intestate in January, 1814, leaving the plaintiff his heir-at-law, who, at his death, became entitled to all his real estates. It then stated fraud in the obtaining of a will, and that the will had never been proved; but that the devisees had entered into the possession of the estates thereby given to them; and the trustees and executors had also proceeded to act under the trusts thereby reposed in them; that the plaintiff intended to bring actions for the recovery of the estates; but that he could not proceed on account of outstanding terms, and that he could not hope for a fair trial within the county; and he prayed that full discovery might be made; and asked to restrain the setting up of the outstanding terms, and to restrain them from selling or disposing of the estates, and from committing any spoil, waste, or destruction thereon. It is obvious how imperfectly the bill is reported, because, as reported, it does not mention waste at all. But it appears from a note to the case of Davenport *v.* Davenport,⁴ that the bill was found on examination to contain very

¹ 2 Cox 205.

² 4 Y. & C. 538.

³ 3 Mer. 161.

⁴ 7 Hare 219, n.

positive and distinct averments of waste, in respect of which relief was asked. The defendants demurred, because, although the plaintiff sought to restrain them from setting up the outstanding terms, he did not aver that there were any. Sir William Grant says, "If this had been a bill merely for a discovery, there are several parts of it to which an answer must undoubtedly have been given," (then he states what they were); "but the plaintiff concludes with praying relief upon the same objects with reference to which he had before stated that he only wanted a discovery in aid of an action. For he prays that this court will declare that the pretended will was not the true will of the late William Jones, and that the same may be delivered up to be cancelled; and, as consequential on that relief, he prays an account of rents and profits of the real estate, an account of the personal estate, of debts and funeral expenses, an inquiry as to next of kin, and a distribution of the clear surplus. It is impossible that, at this time of day, it can be made a serious question whether it be in this court that the validity of a will, either of real or personal estate, is to be determined." As to that part of the case, therefore, there could be no relief. "There is, however," he proceeds to say, "an alternative prayer, that the court will direct an issue to be tried; and then certain other directions are sought as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir-at-law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment; and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment"; adding, that if he can have no issue, neither can he have those consequential directions which the bill asked only on the supposition that an issue was to be granted. "As to the title-deeds," he continues, "the bill merely states the fact that the defendants have the possession of them, but not that they are in any way necessary to enable the plaintiff to recover at law; he stands solely on his title as heir, and does not show how the required production could be of the least service to him. As Lord Rosslyn says, in *Lady Shaftesbury v. Arrowsmith*, 'The title of the heir is a plain one, and it is a legal title; all the family deeds together would not make his title better or worse.'" Then after saying that the plaintiff came to ask that the defendants might be restrained from setting up outstanding terms, but did not aver that there were any such, he says this, "There is a prayer that in the meantime (that is, until the trial of the issue or action) the defendants may be restrained from committing any spoil, waste, or destruction on the said William Jones's real estates, and from selling or disposing of, or charging and encumbering the same,

and that a receiver may be appointed." Then comes the passage which Vice-Chancellor Knight Bruce says he thinks is deserving of special attention: "No case was cited in which the court has interfered at the suit of heir or devisee to restrain waste, spoil, or destruction by either, while they are litigating their adverse rights in a court of law. One should think the case of the devisee a stronger one than that of the heir, because till the will is set aside the *prima facie* title is in the devisee." (He, therefore, differs a little from Sir Anthony Hart in *Lloyd v. Lord Trimleston*.) "Yet in *Smith v. Collyer* an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the court, which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But," he adds, "as a condition of such interference, the court would expect it to be shown that the party applying was proceeding, with all due expedition, to bring the question to a decision"; whereas there that had not been shown.

The point, I apprehend, to which Vice-Chancellor Knight Bruce directs attention, is that Sir William Grant does not abnegate the right of the court to interfere in a case like this. He says, he cannot see why the court should not interfere, and then he goes on rather to seize upon the special circumstance of the omission on the part of the plaintiff to show that he was proceeding with all due expedition to bring the question to a decision. That great judge was very little in the habit of seizing upon slight special circumstances in a case to distinguish it from other cases; but whether it was from feeling unwilling to lay down a principle of such large application, viz., that no interference could under any circumstances take place, or from feeling pressed by the previous authorities, especially that of *Smith v. Collyer*, he leaves the point in that undetermined form. "The court never had interfered to preserve real property; he did not see, upon principle, why it should not, since it had interfered to protect personal property; but as a condition of such interference, the plaintiff must show that he has proceeded with all due expedition."

In that case, therefore, although the bill contained a very strong allegation of waste of the most malicious description, that of pulling down houses upon the property in question, Sir W. Grant refused to interfere, and he gives as his reason, that in his experience he had never known an instance of the court interfering under such circumstances.

The reason may be less satisfactory now that we have in a great measure emancipated both our lands and our minds from many conclusions drawn from the feudal law: but many consequences of that

law remain, and must remain, until altered by the legislature; and among them, I apprehend, is the great respect which is entertained towards the terre-tenant, as distinguished from the holder of mere personal property, which has led this court to refuse (except in cases of fraud, or of irreparable mischief, as by mining and the like) to interfere against the alleged title of the person actually in possession.

As regards mere rents and profits of real estate, there is, of course, an obvious reason for not interfering in the manner in which the court would interfere for the purpose of preserving personal property. In the case of personal property, it is the whole, the corpus, which the court is called on to preserve; but the rents and profits of real estate are merely the produce *de anno in annum*, which do not require the same summary interference. As regards waste, that is a case, to a certain extent, affecting the corpus,—and if it be by mining, much more seriously affecting the corpus. Upon that, Vice-Chancellor Wigram, in *Davenport v. Davenport*,¹ was pressed with a very able argument. I do not find the case in Molloy cited before him, but in the face of this decision of Sir William Grant, concurring with the observation there made, of there being no good reason why the court should not interpose with reference to real and personal estate, and concurring with the observation of Vice-Chancellor Knight Bruce in *Haigh v. Jaggar*, he refused to interfere; no doubt the case was one of great suspicion, it being a mere fishing bill by a person who had been nineteen years out of possession, and there being many other circumstances unfavorable to the plaintiff's case.

The result of the authorities is, that there is no case whatever of such interference. The judges have declined to say,—and I respectfully beg to follow them in declining to say,—that there may not be a case made out even with reference to real estate, which would be acknowledged by every one to be a case for interference. I do not deny that there may be a possible case in which, while the parties are in litigation on a merely legal title, there may be such utter destruction carried on, such stripping the estate of its timber (to take the cases put by Vice-Chancellor Knight Bruce), or pulling down the capital messuage, or such other circumstances, as might justify interference. The dicta only go to such cases; in those dicta I entirely acquiesce; and if such a case should arise, I would not, for one moment, suggest doubts whether so salutary a jurisdiction might not be exercised for the prevention of such malicious acts of spoil, trespass, and injury, while the rights of the parties are in litigation. But, looking at the authorities, I must say that it will require a clear case of

¹ 7 Hare 217.

that description to be made out, before the court can be called upon so to interfere.

Upon the face of this bill all I find is, first, the case made as to the rents and profits, which I have dealt with; secondly, that with regard to the alleged loss of rents and profits by the tenants not paying either party, which I have also dealt with; thirdly, the allegation as to the timber,—no specific allegation, but a mere general allegation, that they have cut down a considerable quantity of timber,—that some of it was of an ornamental character, and some of it was not ripe for cutting; that they have sold the same and received the proceeds thereof. There is nothing like that stripping of the estate of its timber, nothing like that destruction of the property, which is required before one can interfere; and as to the title of the plaintiff, I do not say it is like the case of *Davenport v. Davenport*, a mere fishing bill, but the title of the plaintiff is in a much less favorable position, in many respects, than was the case in *Jones v. Jones*, the title there alleged being that of mere heirship, and the bill charging that the pretended will had been obtained by fraud. In this case the plaintiff is obliged to state, on the face of his bill—and he states his case perfectly, fairly, and honestly—that in order to make out his title to the property in question, he must make out his title to the Earldom; that for this purpose he must go through a long pedigree, and exhaust the issue of numerous persons descended from an ancestor who died as long ago as the fifteenth century; that the question of his title to the Earldom is actually pending for adjudication before a branch of the legislature, who have, as yet, come to no determination upon it, and who have not, as it appears to me, expressed (although I do not think it would make any material distinction if they had expressed) an opinion in favor of the plaintiff upon more than two of the three obstacles which he found in his way. In such a case, there being other persons claiming under an adverse title, who have come into possession and are enjoying the rights which the law confers upon those who can obtain the attornment of the tenants and the enjoyment of the estate, I think I should be going very far beyond anything which the court has hitherto sanctioned, and I should be actually overruling the case of *Jones v. Jones*, if I held that relief could now be given to the plaintiff.

There is one observation suggested by the ground, upon which Sir William Grant seems to prefer resting his decision ultimately in *Jones v. Jones*, viz., the time the plaintiff had allowed to elapse without proceeding at law. It is true that in this case Lord Talbot has taken a wise, and no doubt a most beneficial course, in attempting at once to establish his claim to the peerage before the House of Lords. At the same time, if he wants such a remedy as is sought by this bill—if he

wants with a high hand to stay the receipt of the rents and profits, and the enjoyment of the estates by those upon whom the law confers the enjoyment till they are displaced, I am by no means so clear that his best and most prudent course would not have been to proceed (and it is not contended by counsel that he could not proceed) to recover the estates at law. In that case he would prove the patent of the original Earl, he would next prove his own descent, and that he is the person entitled as Earl; and I apprehend that it would be no answer to him, so proceeding at law, to say that the House of Lords has not yet adjudged that he was entitled to the Earldom. I do not express the slightest opinion, nor have I come to any conclusion, upon the result of the proceedings before the House of Lords. The question I have to consider is, whether he could not have taken proceedings at law before filing his bill, and whether, if he requires the summary remedy prayed by his bill, he ought not to have satisfied this court that there is an action pending at law between him and the defendants in possession, which will try the right as between him and them. There is certainly no averment in the bill (it is contrary to the fact, and therefore could not be averred), that any proceeding in a court of law is pending as to the estates in question. Lord Talbot is now attempting to establish his right to the peerage in the House of Lords, and he says that will be a step towards establishing his right in the ejectment.

An analogous case has occurred to me which certainly might arise, and I believe has actually arisen—the case of a devise to an executor simply, no executor being named in the will, and then another instrument naming the executor, and litigation pending in the Ecclesiastical Court to ascertain who is the executor. You would be obliged to go to the Ecclesiastical Court to make yourself out executor; but you are executor before probate, and therefore you could bring your action before the suit in the Ecclesiastical Court was determined in your favor; and I apprehend that if you applied to this court to protect the real estate pending that suit, this court would say that an action ought to be brought, and would require to be satisfied that there was *bona fide* litigation at law, between you and the parties claiming adversely, to establish your right to the property which you seek to have protected.

I think if it stood on that narrower ground, which I do not rest it on, because the broader grounds are sufficient, there would be considerable difficulty in supporting this bill against the demurrer.

Before leaving the subject of the demurrer I ought to notice that there is another singular token of weakness in the statement of the plaintiff's title. I commented upon his having that long and difficult

title to make out, but in the prayer he prays that the rents of the estates and the proceeds of the timber sold by the defendants may be secured "for the benefit of the plaintiff, or the person or persons who shall be found entitled to the same." That is a singular instance of weakness in stating the title.

I come now to the plea. The plea is to that portion of the bill which seeks for a receiver in respect of certain estates vested in the defendants Mr. Hope Scott and Mr. Serjeant Bellasis, as trustees for whoever may eventually be shown to be Earl of Shrewsbury, and as such entitled under the original act to those estates. I apprehend it is a good plea. You ask to have certain relief against me, certain accounts of rents and profits, and other relief of that description, on the ground that you are the heir. You could not maintain the case if you were not the heir. You could not come here as *amicus curiae*. I plead that you are not heir.

The plaintiff says, "That is not my equity. My equity is, that the thing is in contest. I aver that I am heir; you say I am not; and whilst the thing is in contest I want to have the property preserved: and to say that I am not heir, is only repeating what I have said in the bill. I have said in the bill that you deny I am heir, and my equity is founded upon there being that contest between us." But if it rests upon that, then all the arguments previously applied to the demurrer apply to the plea. If you profess to rest upon this, that during the contest the court, simply on the ground of the existence of a contest, will take possession of the property, I apprehend that alone will not do, if the defendant by way of defense to the whole litigation says, I am prepared to prove, in the progress of this cause, that you have not the slightest interest in the question at issue, and that you are not in a condition to maintain the bill. A negative plea of no heir is admitted to be a good plea in all cases. I apprehend that the reason the plea is not usually put in, that you are not next of kin, when you apply for a receiver *pendente lite* in the Ecclesiastical Court, is, that with regard to the question of receivership the thing would be wholly inoperative. It appears to me, that, on replying to the plea, the suit is not out of court,—the suit is in litigation, the court is master of all the facts, and knows that there is a question to be tried, and with regard to personal estate grants a receiver, if it thinks it right under all the circumstances of the case.

It seems to me that this is a good plea in law to the bill. I cannot conceive any more complete defense to a bill than to say, "You, the person suing me, asking me to answer and litigate with you certain questions, are an utter stranger and have no interest whatever in the matter." You may reply to that, "I shall prove the contrary"; there

will then be a contest, and an interlocutory application may be made during that contest.

With regard to the plea being overruled by the voluntary answer, I do not think I can hold that to be the case, since it is an answer in support of the plea. If the answer discovered anything which these defendants refuse to discover, that would be an overruling of the plea; here, I apprehend, there is no overruling of the plea.

That was the only objection urged to the form. I am bound to say that I have not looked carefully into the form myself, but I have taken it for granted that the counsel have done so, and have found no other objection to be made.

I must allow both the demurrer and the plea; but I give leave to amend as to the plea. As to the demurrer, if any *bonâ fide* case can be raised about the timber, it would be a proper case to amend.¹

Demurrer allowed : Plea also allowed, but with liberty to amend so much of the bill as was covered by the plea.

NEALE v. CRIPPS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., JUNE 9, 12,
1858.

[*Reported in 4 Kay & Johnson 472.*]

GEORGE NEALE, deceased, by his will, in 1795, devised a farm and lands in the parish of Haresfield, in the county of Gloucester, to his godson Charles Neale for life, with remainder to his first and other sons successively in tail, with remainders over.

Charles Neale died in 1856, having had six sons, of whom the first and second died in infancy and without issue. The plaintiff claimed as eldest son and heir in tail of the third, the defendants claimed through the fourth son of Charles Neale.

On the 26th of April, 1858, the plaintiff commenced an action of ejectment in respect of the premises, by causing a writ of ejectment to be served on one Harris, who, on the death of Charles Neale, had attorned tenant to the defendants. On the 12th of May, the defendants appeared to the writ as defendants to the action, and as claiming to be entitled to the estate.

The bill prayed that the defendants might be restrained from cutting down any timber or timber-like trees standing or growing on the

¹ The plaintiff's counsel said they could not suggest that the bill could be amended in this respect.

estate, and from removing therefrom or disposing of any timber or timber-like trees which might already be cut, and from committing any other waste on the estate, and for an account.

By an affidavit filed on behalf of the plaintiff, it was deposed as follows: "The said defendants have lately caused the timber and timber-like trees on the said estate to be cut down, and, to a considerable extent, since the said action of ejectment has been commenced, and they are proceeding to cause the remainder of the trees on the said estate which are of any value to be cut down; and the said defendants or their said solicitors have cut down the timber standing on the said estate in such manner and to such extent as nearly to strip the land of all trees and timber-like trees thereon of any value; and I believe that the said defendants have cut down the said timber, and are proceeding to cut down the remainder thereof, for the express purpose of wasting the value of the property of the plaintiff in the said estate, and with intent to defraud the plaintiff of his just right in the said estate; for the way in which the said timber is cut is so destructive, that it cannot be referred to any fair act of ownership."

Mr. Langworthy now moved, *ex parte*, for an injunction, as prayed by the bill, submitting that the acts complained of were destructive and malicious, and such as no *bonâ fide* owner would do: and he cited dicta of the Vice-Chancellor in *Earl Talbot v. Hope Scott*, to show that flagrant acts of such a character would be restrained before judgment, notwithstanding the reluctance of the court to interfere in favor of a plaintiff who was out of possession, and claiming under a title at law.

The Vice-Chancellor, after reading the extract from the affidavit, granted an interim injunction until the 14th of June, in terms of the prayer of the bill; with leave to serve notice of motion for the 12th: the plaintiff undertaking to be answerable for damages.

Notice of motion for an injunction in terms of the prayer having been served on the same day pursuant to this order, and the defendants not appearing, Mr. Langworthy now moved for an order, according to the terms of the notice of motion.

VICE-CHANCELLOR SIR W. PAGE WOOD. I remember the acts of waste deposed to in the affidavit. As notice of motion has been served, and the defendants have not appeared, you are entitled to an injunction until the hearing or until further order.

Ordered accordingly.

LOWNDES v. BETTLE.

IN CHANCERY, BEFORE SIR RICHARD TORIN KINDERSLEY, V. C.,
NOVEMBER 23, 1863; JANUARY 23, 1864.

[Reported in 33 *Law Journal, Chancery*, 451.]

THIS was an injunction suit. The bill was filed, by William Selby Lowndes the elder and William Selby Lowndes the younger, against Jonathan Bettle, to restrain him from paring, cutting, or otherwise injuring any grass, turf, or sods upon the plaintiffs' estates, or any part thereof, and from cutting, felling, or otherwise injuring or destroying any of the timber or timber-like trees, brushwood, underwood, or shrubs, growing, standing, and being on the said estates, and each and every part thereof; and from doing or permitting any other act, matter, or thing which might interfere with or be prejudicial to the free and uninterrupted rights of the plaintiffs to the ownership and enjoyment of the said estates, and each and every part thereof; that he might pay the costs, and for further and other relief.

The facts of the case were shortly these: Thomas James Selby, of Wavendon, Bucks, by his will, dated the 19th of August, 1768, devised his Whaddon estates, with their and every of their rights, members, and appurtenances, to his heir-at-law, his heirs, executors, administrators, and assigns, forever, and he declared that if it should so happen that no heir-at-law was found, he thereby constituted and appointed William Lowndes, Esq., of Winslow, in the county of Buckingham, Major in the Militia, his lawful heir, on condition that he changed his name to Selby.

The testator died a bachelor on the 7th of December, 1772. Advertisements for the heir were repeatedly published, but no one ever proved his right as such; various persons, however, from time to time, alleged themselves to be such heirs, and brought suits in equity and actions of ejectment, though without success.

William Lowndes took the name of Selby by royal license.

In March, 1783, a decree was made in a suit instituted in this court establishing the testator's will, with a direction that William Selby should be let into possession of the estates, which was accordingly done, and he and his successors had from that time to the present remained in possession of the estates. William Selby's eldest son resumed the name of Lowndes, and was the father of the elder plaintiff. The younger plaintiff some time since attained twenty-one, and on the 8th of September, 1858, the estates were re-settled and limited to such uses as the plaintiffs should jointly appoint, and in default of appointment, that the younger plaintiff should have a rent-charge, with re-

remainder to the father for life, with remainder to the son for life, with remainder to him in tail male, and after divers other limitations, there was an ultimate remainder to the son in fee.

William Selby Lowndes the younger had never been married. Notwithstanding the time during which the plaintiffs and their ancestors had been in possession of the estates, continual claims had been made to them, and amongst others, by a family named "Bettle."

In September, 1861, the defendant sent a notice to the plaintiffs to the effect that the tenants of the estates were not to pay their rents to "the present trustee, Mr. William Selby Lowndes." In May, 1862, he wrote to Mr. Lowndes stating his intention of "attending in a few days to assert his right to the estates and to take such steps as he might be advised to dispute and disturb the possession." In the same year he wrote another letter to a similar effect, more strong in its terms than the former, alluding to a destruction of twelve trees on the estates, by a claimant to the property, a few years previously, and threatening, "so soon as it suits my convenience and that of my friends, to proceed to different parts of your estates (so called) and there cut down trees," etc., as an assertion of "my just claim, and as the real owner of the Selby estates."

The bill charged that the defendant had no right or claim to the estates whatever, but that even if he had he was barred by the statute of limitations; that the estates had valuable timber upon them, and choice shrubs and ornamental trees, the cutting down or injuring of which would do irreparable mischief and damage; that the defendant threatened to cut sods and trees; and the bill prayed an injunction to the effect already stated.

On the 12th of June, 1862, a motion was made and an order for an interim injunction obtained on an affidavit of service, the defendant not appearing. Subsequently the defendant appeared and put in his answer, which contained allegations of his right to the estates as heir-at-law, and stated that he did not now intend, by himself or his agents, to enter forcibly, but to prosecute his claims as heir-at-law under the direction of this court. He had not, however, entered into any evidence in support of his claims.

The cause now came before the court upon an application to make the interim injunction perpetual.

Mr. Glasse and *Mr. Bristowe* for the plaintiffs.

Mr. T. H. Terrell for the defendant.

KINDERSLEY, V. C. (Jan. 23), after remarking on the threats of litigation, and the vulgarity of their terms, said: Of course the defendant has a right to assert his claim, but he insists on his right to do so by perpetually doing some mischief to the property, evidently supposing

that the continuity of his claim bars the operation of the statute of limitations : whether feigned or real, such appears to be his impression ; but assuming it to be honest, it is a most absurd one. The defendant has not gone into any evidence, but has put in his answer, by which (in effect) he says, “ There being an injunction, while that is pending, I do not mean to do any of the acts complained of.” About the facts, which, at the hearing, there is evidence to prove, there is, indeed, no dispute.

It was contended, for the defendant, that assuming the truth of all those facts, the court could not, according to the law as administered by it, interfere to restrain such acts as had been threatened ; and several cases were cited, although only some of the many which exist on the subject. I have thought it necessary to go through all that I have found (although I may have overlooked some) with great care, because they present a very unsatisfactory state of the law, and there is great difficulty in—I may even say an impossibility of—reconciling them. The difficulty arises (in part, no doubt) from the very considerable change which has taken place in the views of this court on the subject of granting injunctions to restrain injury to property, and from the fact that the court will now do what in the time of Lord Thurlow, and the earlier days of Lord Eldon, it would not have done. Lord Eldon, in the earlier part of his time, alluded to the change even then in progress, and to the facility in granting injunctions as being even then greater than in former times. The other judges subsequently advert to the continuous modifications, which in some degree also, and not unnaturally, accounts for the conflict of authorities that now exists. Another cause for such apparent conflict is, the not distinguishing the cases under certain heads. Now the proper mode of arranging them, I think, is this,—at least, it would be convenient thus to distinguish them. There should be two distinct classes of cases : the one where the party against whom the application for the injunction is made is in possession ; and the other, where the plaintiff is in possession and is asking the court to protect the estate. *A priori*, it is obvious that the court will draw a clear distinction between the two classes of cases. If a man claims to be owner of an estate of which he either is in possession, or in a position tantamount to that, the court will be very slow to interfere to restrain such an apparent owner from doing those acts which an owner so situated may properly do. There is a wide difference between such a case and that of a person claiming to be owner (whatever the ground of his claim), not taking proceedings at law to recover, but coming on the owner’s estate, and doing acts injurious to it. Therefore, it appears to me the cases are to be arranged under these two heads. I have endeavored to do that, but at the same time I am bound to say,

that the great difficulty is to ascertain which party is in possession ; notwithstanding that these are the two obvious heads (which I have mentioned), and having so divided them, the next thing is to discover the law of this court on the subject, so far as it can be extracted from the authorities. First, then, I may observe that, according to the older cases, a wide distinction was taken between what was then called waste and trespass. The term "waste" was used in the sense of spoliation, though with a technical and personal application. It was considered waste when the plaintiff and defendant had a privity of title, such as that of tenant for life and remainderman. If the tenant for life committed waste the remainderman could ask for an injunction. So in the case of landlord and tenant ; then there was a privity, and the tenant in possession doing acts amounting to waste the landlord could have got an injunction. It was by reason of the privity of title that the law called it waste. But when parties did not claim in that way, but by an adverse title, any act done by the one or by the other of them was then called "trespass." That act might have been one of destruction or spoliation. That broad distinction runs through all those cases.

I am not now going to consider the cases of waste, but only those of trespass, as distinguished from waste, which, in strictness, ought to be called spoliation, and not waste. Referring then only to cases of trespass, those ought to be ranged again under two heads, viz., the one where the defendant is in possession and the plaintiff seeks the injunction, and the other where the plaintiff is in possession and asks to restrain some acts done by the defendant who claims adversely.

With respect to the cases where the defendant is in possession, of course, one can hardly conceive a plaintiff asking for an injunction unless on an adverse claim, each claiming to be the real owner of the estate. The earliest case under this head was that of *Hamilton v. Worse-fold*, before Lord Thurlow, which is to be found in a note of Sir Samuel Romilly's.¹ That was a case in which it could hardly be considered that either party was actually in possession : perhaps the defendant was ; but the plaintiffs had never received rent, and Lord Thurlow, after some hesitation, granted an injunction, restraining not only the defendant but the tenants from committing waste. Not much reliance can be placed on that case, because there may have been collusion between the defendant and the tenants, and it may be that the defendant was not in possession. Lord Thurlow at first considered it as trespass, but ultimately did restrain the defendant and the tenants.²

The next case was *Pillsworth v. Hopton*, in 1801. There, the defendant being in possession, the plaintiff claimed under an adverse title, and Lord Eldon refused the injunction.

¹ 10 Ves. 290.

² Reg. Book, (A) 1786, fol. 1.

The next case was *Crockford v. Alexander*,¹ in 1808, a case of vendor and purchaser, a peculiar case, and hardly in point. The plaintiff there had contracted to sell an estate to the defendant, who obtained possession, and began to cut timber. It is difficult, therefore, to say there might not have been privity there. Lord Eldon says: "Although at law the defendant is a trespasser, he is in equity, by the effect of the contract, the owner of this estate, having taken possession under the contract, and the vendor is in the situation of an equitable mortgagee. This court has occasionally granted an injunction in cases of trespass as well as waste; and having thought much upon this subject, I will grant the protection against cutting timber, until the power of the court to grant the injunction against trespass shall be fully discussed. Lord Thurlow refused the injunction in this case: a man, possessed of two fields, demised one with the mines under it; the lessee found his way, working under ground, to the mines under the other field which was not demised. Lord Thurlow held that to be trespass, not waste, and did not grant the injunction. In Lord Byron's case it was destruction, not waste; there being no privity between Lord Byron and the persons who had the mill."—[I shall come to speak of Lord Byron's case by and by; Lord Eldon goes on:]—"There is no difference between destruction and trespass where there is no privity of estate, and at law the writ of *estrepement* may be had to prevent repetition of waste." The report adds, that the order for the injunction was made. It is somewhat curious that Lord Eldon in other cases refers to that before Lord Thurlow, which he mentioned in *Crockford v. Alexander*, but does so as if he sometimes thought Lord Thurlow had granted the injunction, at other times that he had refused it. Perhaps he did refuse it at first, but afterwards granted it.

*Jones v. Jones*² was before Sir William Grant. In that case a demurrer was filed by the defendant to a bill by an heir-at-law, seeking discovery and relief, including an injunction to stay waste and destruction pending litigation. Sir William Grant allowed the demurrer. In that case it was held that an heir-at-law out of possession could not have an injunction against a devisee in possession. Sir William Grant says, p. 173, "In *Smith v. Collyer*, an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the court, which interferes for the protection of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise."

The next case is that of *Haigh v. Jaggar*. There, there was a house and land with coal under it. It did not appear that the plaintiffs were

¹ 15 Ves. 138.

² 3 Mer. 161.

working, but the defendants were working out of their own mines into those of the plaintiffs. The latter parties brought two actions, and the Vice-Chancellor (Knight Bruce) refused the injunction, expressing dissatisfaction with the strange state of the law. *Davenport v. Davenport* came before Vice-Chancellor Wigram, on a demurrer which was allowed, as the case was one of an injunction to restrain the cutting down of ornamental timber, after nineteen years' possession.

The next case was *Talbot v. Hope Scott*. The court there stated in effect how much more reluctant it is to entertain a suit against a person in possession than where he is not. The question, "what is possession?" is evidently of great importance, and ought, I think, to be made the foundation of the distribution of the cases. In *Neale v. Cripps* an injunction to restrain stripping timber off an estate was granted, on the ground that the acts done by the defendant in possession tended to destruction. There were two other cases, before Sir Anthony Hart, in Ireland, *Lord Fingal v. Blake*¹ and *Lloyd v. Lord Trimleston*,² where he acted upon the same principles. Those are all the cases in which the plaintiff was out of possession, and the result of them is, that the court will refuse to interfere except where there is fraud or collusion, or where the acts perpetrated or threatened are so injurious as to tend to the destruction of the estate.

I now come to the cases which resemble the present one, where the plaintiff was in possession. Those again are to be divided under two subordinate heads: first, where the defendant claims under a color of right; and, secondly, where he is an absolute stranger. It is not easy to distinguish these cases; the latter may be cases of mere spite: still there are such. In *Mogg v. Mogg*,³ the injunction was refused on the ground that the defendant was a mere trespasser, and an action would lie. In *Mortimer v. Cottrell*,⁴ the injunction to stay waste was refused, because it was a case of trespass and the defendant might at law have been turned out immediately. *Mitchell v. Dors*,⁵ was a case of coal mines in work; there it was held to be trespass and not waste, and yet an injunction was granted, because being coal mines the mischief was considered irreparable.

I must confess I cannot see why the mischief done in the case of coals is more irreparable than in that of trees, for in both cases the injury, whether great or small, may be made the subject of money compensation. *Courthope v. Mapplesden*,⁶ was a case relating to timber, where the injunction was granted, the fact being that a stranger was colluding with the tenants. In *Earl Cowper v. Baker*,⁷ a party was restrained from taking argillaceous stones under the sea. That case was

¹ 2 Molloy 542.

² Ibid. 81.

³ 2 Dickens 670.

⁴ 2 Cox 205.

⁵ 6 Ves. 147.

⁶ 10 Ibid. 289.

⁷ 17 Ibid. 128.

also one of a stranger. In it the mischief was considered to be irreparable. The plaintiff was the lord of the manor, and his rights extended out beyond low-water mark, as far as a certain small barrel, which could be seen from the shore. Lumps of clay had formed within the limit, and had become an article of great value for particular manufactures. Great profit was derived from the sale of the article, and Lord Eldon considered the damage then done to the plaintiff to be irreparable ; not because it was a destruction *simpliciter*, but because it was a taking away of the substance of the inheritance. Great stress was laid in that case on the character of the mischief, and therefore it was that relief was given in equity, although money would have been a remuneration.

I now come to the cases which more immediately resemble the present one. In this case Mr. Lowndes and his ancestors have been in possession of the property for eighty years, and the defendant claims a title, not as a mere stranger, but saying that he is the heir to the property, and that the statute is no bar, because he has removed it by having come, and by claiming to come upon the estate, and by having cut down trees as he pleased in order to assert his right. With respect to cases of this kind, I may observe that an injunction was granted in all cases but one ; but there were elements in some of the cases which are not to be found here.

Those cases are six in number : one was before Lord Camden, not reported originally, but cited in *Mogg v. Mogg*. No name is there given to it ; but it was a case where persons were cutting timber under color of a right to estovers. The plaintiff, who was the lord of the manor, probably alleged the cutting to be beyond what was wanted for estovers ; at all events, the injunction seems to have been granted. Lord Thurlow, however, said that the case did not apply to *Mogg v. Mogg* ; for in that case (as referred to by the plaintiff's counsel in *Mogg v. Mogg*), there appeared to be a right to something in the defendants, though perhaps they carried it beyond what such right went to ; and that until such right was determined, it was very proper to stay them from doing an act which, if it turned out that they had no right to do, would be irreparable. But in *Mogg v. Mogg* the defendant had no interest ; he was a mere trespasser. As such, an action of trespass would lie against him ; and therefore Lord Thurlow would not grant the motion. It was not, as I take it, because the mischief might not have been capable of compensation, but because it was a destruction of part of the inheritance. In the case of *Robinson v. Lord Byron*¹ the plaintiff was in possession of his own water mill. The defendant was the owner of the stream above the mill, and in order to vex the plaintiff, sometimes kept back water from the mill, and sometimes deluged

¹ 1 Bro. C. C. 588.

it with water. In that case it was difficult to say which was in possession ; but Lord Byron was restrained from so using the stream as to do mischief to the plaintiff's mill. In *Smith v. Collyer* the injunction was refused by Lord Eldon, because it was a case of trespass. There infants were in possession by their guardian, and the defendant claimed as heir. Lord Justice Knight Bruce, in *Haigh v. Jaggar*, hesitated to say that Lord Eldon was wrong in *Smith v. Collyer*. He was not satisfied that in the same circumstances the court would not now grant an injunction ; and he referred to the change which had taken place in the law on the subject. *Grey v. The Duke of Northumberland*¹ was a case of copyhold ; and there an *ex parte* injunction was granted to restrain the opening of a mine. The defendant claimed as lord of the manor ; and Lord Eldon on motion to dissolve the injunction² said he would do so, unless some means of producing a speedy trial of the right at law could be insured. *Kinder v. Jones* was also a case of the lord of a manor ; the subject-matter of the suit being trees. There Sir William Grant, sitting for the Lord Chancellor, granted the injunction. The last case on this head is *Thomas v. Oakley*.³ The defendant there having the right, as an easement, of taking stone from the plaintiff's quarry for building and other purposes on a certain part of his own estate, took stone for the like purposes on other parts of his estate. The plaintiff filed his bill for an injunction and an account. The defendant demurred, and the demurrer was overruled on the ground that the defendant was subtracting from the inheritance. In all these cases (except *Smith v. Collyer*), where the plaintiff was in possession and the motion was made for an injunction to restrain the defendant, who claimed under an adverse title, the injunction was granted. Many other cases might be referred to containing dicta which tend to show the continually increasing feeling and opinion among the learned judges, of the impropriety of preserving the distinction between trespass and waste, and the injustice of refusing to interfere in all cases of trespass.

But I have now to consider what the court is to do in this case, where the plaintiff is in possession, as it seems lawfully, and is asking for an injunction to restrain the defendant who is out of possession, but who claims a title (however incapable it may be of being supported) as heir at-law to the property. He has also given notice that whenever it suits his convenience he will cut down trees, cut sods, etc., and he has reminded the plaintiff of twelve trees cut down by him or his family on a former occasion, which is as much as to say that he will do the same thing again. If a person desires to do a certain act for the purpose of asserting a right, or keeping alive a claim, this court will not restrain him from doing the act if it is necessary to his title, and for his benefit,

¹ 13 Ves. 236.

² 17 Ibid. 281.

³ 18 Ibid. 184.

but nothing can be more absurd than the notions, not to say the delusion of the defendant ; he has only to refer to any lawyer, who would say to him, " How can you do any good by cutting down trees ? " etc. ; but his own opinion was, that although the plaintiff has an eighty years' title, he had a right to the property as heir. Then, again, even assuming that he is the heir, and means to show his title, he has not shown it. No doubt, under the old rule, his acts would have been tantamount to a trespass. He might, as it is, come on the land and do irremediable damage, incapable of being compensated by money. He might injure the most valuable and ornamental trees, the cost of which could not be compensated for by money. The question, then, would be, whether such acts were against his conscience ? That would be the test. It appears to me that the case comes under the head of "irremediable waste," as defined by Lord Eldon, that is, a destruction of the substance of the inheritance ; and I think it comes within the cases in which the plaintiff being in possession and the defendant not, an injunction has been granted. I think, therefore, that under the circumstances, and having regard to what appears to me to be the constant tendency of the decisions upon the subject, viz., to break down the unreasonable distinction between trespass and waste, that this is a case in which the injunction ought to be granted.

I have gone into this case at great length, because of the difficulty of finding the principle upon which to act ; I should say, however, that it is this : where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of, the court will not interfere, unless, indeed (as in *Neale v. Cripps*), the acts amount to such flagrant instances of spoliation as to justify the court in departing from that general principle. Where the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under the color of right, then the tendency of the court is *not* to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the court will grant it. But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant the injunction, at least when the acts done either do or may tend to the destruction of the estate. I am of opinion, therefore, that this injunction must be made perpetual.

STANFORD *v.* HURLSTONE.

IN THE COURT OF APPEAL IN CHANCERY, DECEMBER 18, 1873.

[*Reported in Law Reports, 9 Chancery Appeals 116.*]

THIS was a motion by way of appeal from an order of the Master of the Rolls refusing to dissolve an *ex parte* injunction.

The plaintiff was entitled in fee to a farm at Slaugham, in Sussex, part of which consisted, as the plaintiff alleged, of a wood called Jenner's Wood. This wood was bounded on two sides by the farm, on the third by a road, and on the fourth by property of the defendant. The plaintiff deposed that his father purchased the farm in 1828, that he succeeded to it under the will of his father, and that his father and he had been in undisputed possession of the farm, including the wood, from 1828 till 1859.

In 1859 two actions of ejectment were commenced against the present plaintiff, Mr. Stanford—one by the present defendant, Mr. Hurlstone, to recover one moiety of the wood, and the other by parties who claimed the other moiety. Mr. Stanford, at the trial of the second action in 1860, adduced evidence of adverse possession for more than twenty years, and the plaintiffs in that action elected to be nonsuited.

The former action was not brought on for trial, but was discontinued by Mr. Hurlstone in 1861, and no further legal proceedings were taken.

In September, 1873, the defendant cut a gap through the fence between his property and Jenner's Wood, and on its being repaired by the plaintiff's workmen, cut it through again. It was again repaired by the directions of the plaintiff's bailiff, and again cut through by the defendant's orders.

On the 10th of October, 1873, the defendant applied to a sergeant in the police force to attend on his cutting a tree in Jenner's Wood, as he apprehended a breach of the peace. The police sergeant accordingly attended with a constable on the 13th, when two workmen, by the defendant's orders, cut down a tree in the wood. The plaintiff's bailiff came up, and the defendant told him that the tree was cut as a challenge to the plaintiff, and that he (the defendant) would cut twenty more. The plaintiff did not use force to prevent these proceedings, but on the 21st filed his bill praying an injunction to restrain the defendant from cutting any timber in the wood, and from otherwise interfering with the plaintiff's possession thereof. An injunction was granted *ex parte* on the following day.

On the 26th of November the defendant moved to dissolve this in-

junction. By his affidavit filed in support of the motion, he set forth the grounds on which he alleged himself to be entitled, into which it is not necessary to enter. He further stated, that in August, 1860, he had taken into his own possession his property adjoining the wood, and had ever since resided in the cottage on that property during the whole or part of the Long Vacation in each year, and occasionally gone to it for a day or two at other times of the year; that while staying at the cottage he had continually gone into the wood and walked and sat there, especially in the heat of the summer; that he had gathered the nuts and cut pea-sticks in the wood; that he had turned his pigs into the wood to eat up the acorns, and his cows had been in the wood; that when the brambles grew thick among the underwood he had cleared them out in order that he might walk and sit more conveniently in the wood, and that during the whole of the period in which he resided at the cottage he had never been disturbed in his possession by the plaintiff or his servants till the disturbance thereafter mentioned. The disturbance thus referred to was the stopping up the gap made by the defendant in the fence, his account of which did not materially differ from the account given by the plaintiff's evidence, except that the defendant stated the gap to have been made some months before September, 1873.

The Master of the Rolls refused the motion with costs, and the defendant appealed.

Mr. Fry, Q. C., and Mr. Drewry for the appellant.

LORD SELBORNE, L. C. I am of opinion that a more proper order than that under appeal was never made. So far as appears on the evidence before us, the plaintiff, supposing him to have had no other title, had in 1860 been in possession of Jenner's Wood for more than twenty years, and therefore, unless something could be shown which was not shown, he had, under the present statute of limitations, a good title in fee. In that year two actions of ejectment were brought admitting the present plaintiff to be in possession. In one of those actions the plaintiffs elected to be nonsuited, and the other action, which was brought by the present defendant, was discontinued. The defendant adduces evidence to show acts of ownership by himself since that time, which might be evidence of possession if he had a title, but which, considering the evidence of his want of title, can only be treated as acts of trespass—mere acts of trespass, which could not bring the possession into controversy. The defendant then takes upon himself to cut down a tree, calling in the police to prevent the plaintiff from resisting the act by force. The plaintiff properly acquiesced, and offered no forcible resistance. He thus was powerless, and the defendant threatens to cut down more trees, and to bring a

number of men for that purpose. If the court has authority to grant an injunction, that authority ought to be exercised. Some of the cases do not appear very reasonable, but in modern times the cases in which an injunction against waste has been refused have been cases where a plaintiff out of possession asked for an injunction against a defendant in possession. We need not consider whether in all those cases the court exercised a sound discretion, if the matter is one of discretion. It is enough to say that in *Lowndes v. Bettle*¹ a very learned and careful judge held that, in circumstances closely resembling those of the present case, an injunction could be granted, and we have much satisfaction in following his decision.

Sir W. M. JAMES, L. J., and Sir G. MELLISH, L. J., concurred.

GOODSON v. RICHARDSON.

IN THE COURT OF APPEAL IN CHANCERY, JANUARY 15, 19, 1874.

[*Reported in Law Reports, 9 Chancery Appeals 221.*]

S. GOODSON, the plaintiff in this case, was owner in fee of an undivided moiety of lands in the Isle of Thanet, abutting upon the highway from Broadstairs to Ramsgate, and as such was owner in fee of an undivided moiety of the adjoining half of the highway. He was also shareholder in a waterworks company at Ramsgate. The defendant, R. Richardson, owned some houses at Ramsgate, and, being dissatisfied with the waterworks company, proceeded to construct waterworks for the supply of his houses. He applied to the Highway Board of the Isle of Thanet for permission to lay down pipes along the highway, which, after some time and discussion and opposition from the waterworks company, was, on the 8th of April, 1873, granted to him; the clerk to the board at the same time informing him that the board could only give permission subject to the rights of the owners of the lands. The defendant had on the 4th of April begun to lay the pipes along the highway, and (apparently in the course of the day of the 9th of April) he laid the pipes in the soil of the side of the road adjoining the land of which the plaintiff had an undivided moiety. On the same 9th of April the plaintiff and other landowners served the defendant with notice not to lay pipes in their lands, and that they intended to apply for an injunction. There was a dispute as to the exact times when the pipes were laid, and when the notice was received.

On the 21st of April the bill in this suit was filed, praying for a

¹ 10 Jur. (N. S.) 226.

perpetual injunction to restrain the defendant from so laying any pipes and from allowing them to remain. The Master of the Rolls, Sir G. Jessel, made a decree for a perpetual injunction, and the defendant appealed.

Mr. Jackson, Q. C., and Mr. J. Beaumont, for the appellant.

Mr. Southgate, Q. C., and Mr. Davey, for the plaintiff, were not called upon.

LORD SELBORNE, L. C. In this case the Master of the Rolls has thought it right, in the exercise of that discretion which, as Mr. Beaumont very properly said, is a judicial and not an arbitrary discretion, to grant an injunction restraining the continuance of certain water-pipes which the defendant has placed in the plaintiff's land.

Now, it is undoubtedly true that where a legal remedy exists, this court, in determining whether it will leave the parties to that legal remedy or will interfere by way of injunction, has regard to the circumstances of each particular case, and amongst those circumstances are, no doubt, the time at which the work was executed, and also what will be the result to the parties of the interference of the court, on the one hand, or of leaving them to their legal rights and liabilities, on the other hand. But I apprehend that the court has nowhere said that when a trespass of this kind has been committed under circumstances at all similar to those in the present case, the mere fact of the trespass being complete at the time when the bill was filed will prevent an injunction against the continuance of the trespass.

The plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take that soil for such a purpose, except under contract with the owner, or with his consent. At the same time the plaintiff has not the right of an unlimited owner in respect of that soil, because the upper surface is dedicated to the public for the purpose of a public highway, which is under the management of local authorities ; and the plaintiff cannot use the soil, or deal with it by breaking it open, or in any other manner, so as to interfere with the use of it by the public for the purpose of a highway.

These pipes, therefore, being laid below the surface, the plaintiff might not, without exposing himself to difficulties with the public authorities who are the guardians of the highway, be able to redress the injury in the easy and simple manner which he could if the same thing had been done in an ordinary field.

It is said that the objection of the plaintiff to the laying of these pipes in his land is an unneighborly thing, and that his right is one of little or no value, and one which Parliament, if it were to deal with

the question, might possibly disregard. What Parliament might do, if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as Parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this court can take. But with respect to the suggested absence of value of the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in this land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person desirable and an object sought to be obtained. Besides which, I am not prepared to accede to the proposition that it is an unneighborly proceeding in a man, whose motive for desiring to prevent a particular act may be collateral to the interest in his land—such, for instance, as his being a proprietor of waterworks which may be injured by the proposed use of it,—to say to his neighbor who wishes to compete with him in that business, “ You are perfectly at liberty to enter into competition with me as a seller of water to the public of Ramsgate in any lawful manner ; but you are not at liberty to take my land without my consent for the purpose of competing with me, and I shall object to your doing so ” In that, I confess, I see nothing unneighborly whatsoever.

Then what are the actual circumstances of this case ? The plaintiff has certainly been guilty of neither acquiescence nor delay. [His Lordship then stated the facts of the case.]

In that state of things, and looking to the nature of the work, and that it was capable of being so quickly done, and done in that manner, I have no hesitation in saying that I think this court is bound to deal with the case exactly as it would have done if this bill had been filed, not as it was a few days afterwards, but on the morning of the day, and before any part of the work had been done.

I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land ; and it appears to me, as such, to be a proper subject for an injunction.

The cases which have been referred to are either cases of ancient lights, such as *Durell v. Pritchard*,¹ or cases of covenants, such as *Bowes v. Law*,² where a man had, once for all, done upon his own land something which exposed him to an action by the other party.

¹ *Law Rep.* 1 Ch. 244.

² *Law Rep.* 9 Eq. 636.

In those cases the thing was finished, and in the judgment of the court it was more equitable, having regard to the consequences of interference or non-interference, to leave the parties to their legal rights and liabilities, or to give damages, rather than to interfere by injunction. No doubt in such a state of things the *quantum* of damage to the plaintiff, as compared with the *quantum* of loss to the defendant, is a material consideration; but that consideration does not appear to me to arise in the present case.

The other class of cases is that exemplified by *Deere v. Guest*,¹ which, when rightly considered, amounted to neither more nor less than an action of ejectment brought in the Court of Chancery without any equitable circumstances to induce that court to assume jurisdiction. The facts were these: The defendant had made a tramway and completed it openly, so that everybody interested in the land either did know or might, three years before the bill was filed, have known what was taking place. That had been done lawfully, with the consent of the tenant, subject to some question of waste which I will not enter into. That was a case between landlord and tenant. But so far as the possession was concerned, it had been lawfully acquired by the consent of the then occupying tenant. His occupation continued for about three years afterwards, and, as far as appears from the statement on the bill (for that case arose on demurrer), even when the tenancy ceased the land was re-let to a person who, upon the allegation in the bill, must be taken to have consented, so far as he could consent, to the continuance of the occupation of the tramroad by the defendant. The bill, however, contained an allegation which Lord Cottenham thought obscure, that when the land was re-let the plaintiff had reserved to himself the tramroad. The allegation was, therefore, that the right to the tramroad or to the possession of the land had been originally given by the person in occupation, and was confirmed by the person subsequently in occupation, but that he had no right to confirm it. It also appeared that the owner of the equity of redemption had sold to the defendant the right to have the tramroad, also that the plaintiff had not even the legal title of mortgagee, for he was only the husband of the administratrix of the mortgagee, and interested in the money only, though no doubt he was entitled to call on the persons who had the legal estate to defend his rights. He had brought an action of trespass against the defendant on account of this tramroad. In point of law the defendants, having lawfully got possession three years before, were continuing in possession, and the plaintiff's title, or rather that of the trustee for him as mortgagee, was a purely legal title on the showing of the bill, and

¹ 1 My. & Cr. 516.

there was no impediment to an action of ejectment or an action of trespass. In that state of circumstances, Lord Cottenham thought—and, in my judgment, was quite right in thinking—that there was no equity whatever to interfere, and that the case was a simple attempt to transfer the jurisdiction in ejectment from law to equity.

Had the circumstances of this case been similar, and had these pipes been laid with the consent of the tenant three years before, and used as part of the system of waterworks during the whole of that interval, and had it been a case of possession, originally legal but now liable to be displaced by ejectment, I have little doubt that I should have come to a similar conclusion. But all the circumstances of the case are entirely different, and the principle upon which this case ought to be dealt with is, in my opinion, that upon which the Master of the Rolls has dealt with it. Therefore, I, for my part, cannot give a voice for disturbing the judgment of the Master of the Rolls.

SIR W. M. JAMES, L. J. I am of the same opinion. The defendant in this case is admittedly a trespasser. He has committed a trespass upon the plaintiff's land without any legal justification or any legal excuse whatever; and he proposes to continue that trespass from day to day, keeping the pipes and allowing the water to go through them for the purpose of making a profit of a trade which he proposes to set up in rivalry to a trade which the owner of the land upon which he is so committing the trespass is interested in. It is said that we ought to allow this to be done, that we ought, in fact, to dismiss the plaintiff from this court, and tell him to find his way to another court, in which he is to bring an action for the wrong for which there is no defense whatever. He is to bring that action at his own cost, and having succeeded in one action, he is to bring a second—I do not know whether more than one will be required—and then, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to this court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions.

I do not think that there is any principle in this court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it.

It is said that something of the kind was done in *Deere v. Guest*. In that case, beyond all question, the *ratio decidendi* (and that is always to be looked at when you are referring to an authority or decision) of Lord Cottenham (who affirmed the decision of the Vice-

Chancellor) was that the defendant was a person in possession, and that the bill was a bill in substance brought to turn him out of possession, and to give the possession to the plaintiff, which would be strictly and simply an ejectment bill, and such a bill is not according to the practice of this court. Here there is nothing like a possession by the defendant. The plaintiff has been in possession, and is in possession, and the defendant has been a wrong-doer, and a mere trespasser, who proposes to continue so.

The question is whether, under those circumstances, the plaintiff has not a right to come here, and so to put an end to that continuous trespass which the defendant has begun and intends to continue, there being no wrong whatever that can be suggested to the defendant. What is alleged on his behalf here is, that if we grant the injunction we shall deprive him of a very valuable property, because it is essential to the value of his property that he should keep the plaintiff's property, which has been taken against his consent. Even if the defendant did originally unconsciously take that which was not his, yet he very soon became conscious that it was not his, and that he was taking that which was not his for the purpose of a profit to himself, against the will of the real owner. That is taking another man's property improperly, both morally as well as legally. I am of opinion that the decision of the Master of the Rolls is quite right, and that the injunction ought to be sustained.

SIR G. MELLISH, L. J. I am of the same opinion. I think it is quite clear that the defendant has not got into possession of any portion of real property of the plaintiff so as to make it necessary for the plaintiff to bring an action of ejectment.

It is perfectly true that when a system of waterworks has been legally established, and the owners have made their reservoir, and have legally laid their pipes all along the streets through which they are supplying the water, then the law considers the pipes so far part of the realty that the owners are liable to be rated as in possession of a portion of the realty, and it may be that an ejectment might be brought against them. But in this case the waterworks had not, at the time this bill was filed, been established at all. All that had been done was that the defendant had entered upon the plaintiff's land, had dug a trench, and had put pipes at the bottom of that trench. I doubt extremely whether those pipes had become part of the realty at all. If they had, they would have become the plaintiff's property. But in my opinion there was never any intention to annex them to the soil so as to make them part of the realty, and I am inclined to think that they remained pure chattels. However that may be, it is not necessary to decide the question, because, in fact, the defendant

has committed a trespass. If that had been the only thing done, it would have been right to leave the plaintiff to recover damages by an action at law; but the defendant was threatening to continue the trespass—threatening to complete his waterworks, and use as his own that which was really part of the plaintiff's property, and to make a profit by it. Then there is this further reason for coming to this court, namely, that, from the peculiar circumstances of the surface of the road being dedicated as a highway, the plaintiff has not the ordinary remedy which he would have had if the defendant had dug a trench and laid pipes across the plaintiff's field. In this case the plaintiff would have had great difficulty in himself removing the pipes. Suppose that a similar trespass was committed on a man's soil while he remained in possession, and there was nothing to prevent him digging it up himself, it would be reasonable enough to leave him to remove what had been wrongly put in the soil, and then to bring an action to recover damages. But in the present case it is extremely doubtful whether he could remove the pipes without rendering himself subject to being indicted by the highway board; and in my opinion he is entitled to be relieved from that difficulty.

The appeal must be dismissed with costs.

JOSHUA WASHBURN *v.* EDWARD F. MILLER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 1,
1875.

[*Reported in 117 Massachusetts Reports 376.*]

BILL IN EQUITY, filed April 24, 1873, alleging the following facts:

In 1822, the plaintiff became the owner in fee of a lot of land in Auburndale; and in 1847, laid out a private way over a portion of it and built a fence on the line of the way. In 1858, the plaintiff sold a portion of the land bounding it on the way, and conveyed to Al Blood a right to use the way by a deed which is set forth in the preceding case.¹ It was the understanding and agreement between the plaintiff and Blood that the way was only to be used for reaching the northerly portion of the land conveyed to him, and that all buildings put upon the said land by Blood and his assigns should be built northerly of the plaintiff's house on the other side of the way.

The bill then set forth the conveyance by Blood to Miller of the southerly portion of the lot, that Miller had built a house and barn southerly of the line in violation of the agreement between the plain-

¹ [Miller *v.* Washburn, 117 Mass. Rep. 371.]

tiff and Blood, had taken down the fence along the private way, and had filled up a gutter which the plaintiff had built on the westerly side of said way for the purpose of keeping the water from the highway from flowing on to his land; that Miller had committed various trespasses on the private way; and had brought an action at law for an alleged trespass by the plaintiff, which action was still pending.

The bill prayed that the defendant might be enjoined from prosecuting the action at law, and might be restrained from trespassing on the private way, and that the buildings on the defendant's line might be removed northerly of the line of the plaintiff's house.

To this bill the defendant demurred; and the case was reserved by Devens, J., on the bill and demurrer, for the consideration of the full court.

I. D. Van Duzee for the plaintiff.

T. E. Graves for the defendant.

DEVENS, J. The plaintiff seeks to maintain the bill upon the ground of repeated trespasses by the defendant upon his private way by passing and repassing thereon, and by doing thereon various other acts for the purpose of rendering the same more convenient for his own use.

It is not doubted that an injunction could properly be issued to restrain one from the commission of an alleged trespass where the damage liable to be occasioned thereby would be irreparable; but in such case it would be for the purpose only of enabling the party, whose rights were alleged to be invaded, to test them in a court of law. So where acts of the nature alleged in the bill had been held, in previous suits brought by the plaintiff, to be trespasses, and his title thus fully shown, and it further appeared that damages would not be an adequate compensation for them, it might be proper that a party continuing to commit them should be permanently restrained by injunction. No such case is here presented; it is not averred that irreparable damage is liable to be done, nor are any facts stated which indicate that damages would not adequately compensate the plaintiff. No suit at law has apparently been brought by the plaintiff to establish his right to the way in question as against the defendant; but it does appear that the defendant has brought a suit against the plaintiff for interfering with him in the use of it by certain alterations made by him, and against the prosecution of this suit the plaintiff prays for an injunction. By the bill, therefore, he simply endeavors to remove into this court the determination of the rights of the parties in the use of the way. This should not be done; it is a matter appropriate to the jurisdiction of a court of common law, and if the rights of the plaintiff have been invaded, its powers are ample to afford him an adequate remedy.

Nor can the bill be maintained because it will prevent a multiplicity of suits. All the trespasses as set forth may be made the subject of a single action in which the plaintiff may recover such damages as he shall show he has sustained. There are no embarrassments arising from complicated or conflicting rights of different parties which would justify this court sitting as a court of equity in taking jurisdiction of the controversy.

The other ground upon which the plaintiff relies is equally untenable. He alleges that he conveyed to Blood a tract of land the south-easterly half of which is now owned by Miller by subsequent conveyance from Blood, and that at the time of the conveyance to Blood it was understood and agreed, although not expressed in the deed, that all buildings put upon the land by Blood and his assigns should be built below the lower line of the plaintiff's house, and further avers that the defendant, since the conveyance to him, has proceeded to erect a house and barn upon the land so conveyed, which are above the line referred to.

It is unnecessary to consider what would be the effect of the understanding or agreement as alleged to have been made with Blood. It was apparently verbal, and no consideration for it is suggested, unless we are to infer one from the fact that a conveyance of land was made to him by the plaintiff. But even if it were an agreement binding upon Blood, it cannot affect those who purchase the land without knowledge of its existence. There is no averment that the defendant had any such knowledge; and as it was not expressed in the deed, he has a right to enjoy the title which, by that deed, Blood was empowered to convey to him unaffected by it.

Definirrer sustained.

WILLIAM HENDERSON ET AL., EXECUTORS, RESPONDENTS, *v.*
THE NEW YORK CENTRAL RAILROAD
COMPANY, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 11, 1879.

[*Reported in 78 New York Reports 423.*]

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiffs, entered upon a verdict.¹

This action was brought in 1853, by Mather Williams, the plaintiff's decedent, praying for an injunction restraining the defendants from using certain portions of Washington Street, in the city of Syra-

¹ Reported below, 17 Hun 344.

cuse, described in the complaint, for the purpose of a railroad, and to recover damages for the past use, or for a judgment that if they be permitted to continue such use it shall be only on condition of their paying the damages sustained.

Williams and others, being the owners of the lands through which Washington Street runs, laid out and dedicated said street to the use of the public, and laid out their lands adjoining into village lots for the purpose of sale. The defendants laid their tracks in said street, and used the same, with the consent of the public authorities having charge of the street, but without obtaining the consent of Williams or making compensation to him. The action has been tried three times. The first trial was by the court, without a jury, and resulted in a judgment for the defendants, which was reversed by the Court of Appeals, and a new trial was ordered.¹ In 1868, the cause was tried by a referee, who ordered judgment for the plaintiff for \$19,605.83. He denied the prayer for an injunction, but ordered that upon payment of said sum, the fee of the portion of the street belonging to the plaintiff, vest in the defendants for the use of their railroad. That judgment was reversed by the General Term. About that time Williams, the plaintiff, died, and his executors and residuary legatees and devisees were made plaintiffs, by order of the court. In 1876 the cause was tried by another referee, who ordered judgment in favor of the plaintiffs for \$19,508.79 damages, besides costs, and further ordered that if the plaintiffs tender to the defendants a conveyance of their interest in the land in question, in said street, and a release of their damages, except said sum of \$19,508.79, the defendants shall pay to the plaintiffs the further sum of \$4,339.43 and interest from the date of the report; and in default of such payment, the defendants shall be perpetually enjoined from using such portions of said street, and if the plaintiffs fail to make such tender, the injunction is denied. Upon the last trial the referee found that the construction and use of the railroad greatly impaired the value of the lands of the plaintiffs, fronting upon Washington Street, and extending to its centre, and also the value of the rents and profits thereof. He also found that previous to such trial all of said lands fronting said street had been sold by said Williams or the plaintiffs.

Further facts appear in the opinion.

James R. Cox for appellant.

Daniel Pratt for respondents.

DANFORTH, J. This is the second appeal in this action. The first was by one Williams, then plaintiff, from a judgment dismissing the complaint, rendered by the Special Term of the Supreme Court,

¹ 16 N. Y. 97.

after a trial of the issues, and an affirmance of the judgment by the General Term. The present plaintiffs are the representatives of Williams, and stand in his place. So far as the facts bear upon the cause of action, they are not different from those established on the former trial, and by reason of which this court held that the plaintiff was entitled to recover. The learned counsel for the appellant criticises the conclusion then reached, but the principle which lay at the bottom of that decision, and was then asserted, has since been so often reaffirmed as to make a renewed examination of the questions unnecessary.¹

Upon the first appeal the attention of the court was directed, as it is now, to the plaintiffs' claim for damages accruing to the sold, as well as to the unsold portions of the premises, and while a doubt was suggested as to their right to recover in this suit damages upon the lots which had been sold, because to do so, would in effect deprive the defendant of a right to have them assessed by a jury, that question was not considered, for it was not raised. It has not been raised upon this appeal, nor was any objection made upon that ground before the referee; we are not therefore embarrassed by it, and have only to determine, whether any error was committed by the court below in regard to the measure of relief to which the plaintiffs were entitled. To maintain that there was error in this particular, was the chief contention of the learned and ingenious counsel for the appellant, to whose researches we are indebted for all the authorities bearing upon his position, and they have been applied by him with great persuasiveness. Yet in view of the nature of the suit and the facts found by the referee, we cannot yield to the conclusions urged in support of this appeal. The suit is in equity. The complaint alleges the plaintiffs' ownership of certain lands extending to the centre of Washington Street; an unauthorized entry upon them by the defendant; the cutting down of the street to a lower grade; making embankments from one to three or four feet high upon the sides of the street; the occupation of it by permanently laying down and constructing a railroad track "for the permanent objects of their business," the reduction in value of the plaintiffs' lots lying along this street, the actual depreciation in market value of his land, and the sales thereof at the reduced price; injury to other abutting lots, and to the strip or street, part of his land, actually occupied by the defendant.

The relief sought is: First, damages. Second, an abatement of the use of the railroad, and a removal of the track. Third, an injunction

¹ Mahon *v.* N. Y. C. R.R. Co., 24 N.Y. 658; Carpenter *v.* O. and S.R. Co., 24 Id. 655; Milhau *v.* Sharp, 27 Id. 611; Craig *v.* Rochester City and B.R.R. Co., 39 Id. 404; Rochester Gas Light Co. *v.* Calkins, 62 Id. 386.

against the running of trains, or if the defendants are permitted to use the track to do so "only on condition that the plaintiff shall first be paid his damages." The allegations of the complaint so far as they relate to the conduct of the defendant and its acts are not denied, and upon the trial it was admitted that the defendant's road was located on the premises in question. Evidence was given in regard to the depreciation of the plaintiffs' property in consequence of the defendant's acts above referred to. The referee found upon sufficient evidence the excavation and grading of the street for railroad purposes, changing the former grade one foot, and in some places more than one foot; that the railroad was located, and the track placed with a view to the permanent occupation of the premises during the defendant's corporate life; that prior to its location the plaintiff was a large owner of vacant land, and desiring to bring it into market laid it out into lots, and in furtherance of his object dedicated the strip of land (now traversed by the railroad) for a street or highway. His lots extended to the centre of the street, and the referee finds "that by reason of the construction and use of the railroad, Williams sustained damage, in the impaired value of his land, and of the rents and profits thereof." That other lots also extending to the centre of the street were sold and conveyed by him before the commencement of the action, he reserving "any claim he might have against the defendant for damages in respect to such lands, occasioned by the location, construction, and use of the railroad"; and before such sales were made he sustained damages by reason of the depreciation of the value of the lands from the cause above mentioned. The referee also finds, that the construction and use of the railroad have rendered the lots fronting on the street more inconvenient, and less useful for the residence of families than they would be if the railroad was elsewhere located, and have depreciated and reduced the value of all the lands of Williams referred to in the complaint. The amount of the depreciation is stated, and the allowance of this item, and the admission of evidence relating to it, presents one of the principal questions before us. The other arises upon the conclusion of the referee that if the plaintiffs shall, within a time limited, tender to the defendant a conveyance of all the interest which Williams at the time of his death had in the land lying in front of the lots above referred to, and on which the defendant's road is located, and "release the defendant from all claim from damages arising from the location, construction, and use of its railroad in said street (except the damages above referred to), then the defendant shall pay the plaintiffs the further sum of \$4,339.43, and interest from the date of the report, or in default of such payment the defendant shall be enjoined from using said railroad upon the land in front of the lots specified."

As to the question last stated, the case is plainly for the plaintiffs. Equitable relief is awarded, not as the defendant's counsel claims by way of menace, or as a means of compelling the payment of money, but that the defendant may desist from the unauthorized use of the plaintiffs' property, and forbear from any further interference with their rights. To hold otherwise would leave the citizen remediless against the power of a corporation to acquire and use property without compensation, and to prevent that, the court ought not to be reluctant to exercise its jurisdiction. The facts in this case show that the entry upon the land in question was under the belief that the right to do so had been obtained, but it was not so, and the decree in this particular is just. The defendant is not required to pay the money. It may submit to the injunction. Nor did the referee exceed his jurisdiction in awarding it. All the issues in the action were referred to him to try and determine, and it was his duty to award the proper judgment. In the exercise of its equitable jurisdiction the court, or referee acting in its place, may give full relief, having regard to the rights and interests of both parties. It has done so in this case. In view of the annoyance and expense incident to the stoppage of the defendant's trains, it was just to open the doors of escape and permit the defendant at once to acquire title to the land occupied, and thus avoid the delay incident to other proceedings for that purpose, but it was, notwithstanding, optional with the defendant to comply with the conditions. The plaintiffs could not require it, but they would be bound by the judgment, and the defendant become, on performing the condition, purchaser of the land with rights not inferior to those obtained by appraisement and payment of damages under the statute.¹ But the decision of this court upon the former appeal² established the plaintiff's right to an injunction, and nothing need be added upon this point.

As to the other question it was also then held that the right of the plaintiff to come into a court of equity, rested upon the fact that the trespass complained of was of a continuous nature, and that he might invoke its restraining power to prevent a multiplicity of suits, and could of course recover his damages as incidental to this equitable relief. It would seem, therefore, that the plaintiff should recover in this action all his damages, for if not, then the apprehended evil would not be averted, and the defendant would be subjected to fresh litigation from day to day, and neither party be better off than if the plaintiff had resorted to the other forum; but as it is, the court has power to do complete justice, and a purpose to render it must have

¹ *Wood v. Auburn and Rochester R.R. Co.*, 8 N. Y. 160.

² *Williams v. N. Y. C. R.R. Co.*, 16 N. Y. 97.

been in the mind of the court upon the first appeal, or its language would have been qualified, and not general. Even the doubt expressed indicates it, for that was founded upon no *quære* as to the plaintiff's right to recover all his damages, even "upon the lots which had been sold," but as to the tribunal to assess them. This inference is confirmed by the reference made to this case in that of *Milhau v. Sharp*,¹ where the same learned judge who delivered the opinion on the former occasion and speaks of it as one in "which the railroad had been built, and was in use, and in which damages were claimed for past injuries," and in the case itself, while considering the principal question there involved, the learned judge says: "Any one can see that to convert a common highway running over a man's land into a railroad, is to impose an additional burden upon the land, and greatly to impair its value. As no compensation has in this case been made to the owner, his consent must in some way be shown. The argument is, he has consented to the laying out of a highway upon his land, *ergo*, he has consented to the building of a railroad upon it; although one of these benefits his land, renders access to it easy, and enhances its price, while the other makes access to it both difficult and dangerous, and renders it comparatively valueless." In view of these suggestions, I cannot doubt that the very element of damage, upon which the present judgment rests, was before the court when about to declare the assessment of damages, a right to which the plaintiff was entitled as incidental to the right to equitable relief. It was a substantial discrimination between a direct and permanent injury to the inheritance, such as the one in question, and an occasional obstruction by the passage of trains, or the excess of water thrown by an embankment upon a neighbor's land after a storm of rain, or from melting snow. It indicates an injury to the property itself, and not one dependent upon the use to which it may from time to time be put. A material injury affecting the value of the land, making it less salable, and only at a diminished price. But that decision itself was in obedience to an elementary principle under which, when a court assumes jurisdiction in order to prevent a multiplicity of suits, it will proceed to give full relief, both for the tortious act and the resulting damages.²

McRea v. The London, Brighton, and South Coast Railway Co.,³ was not unlike the case before us. At the time of filing the bill the plaintiffs were entitled to an injunction against the railroad company,

¹ 27 N. Y. 625.

² *Ex parte Marsh*, 1 Mad. Chy. Pr. 149; *Ryle v. Haggie*, 1 Jac. & Walk. 233; Francis' Maxims, 42; *Lee v. Alston*, 1 Ves. Jr. 81.

³ 37 Law Jour. R. (1868) Eq. p. 267.

and damages were awarded at the hearing, although no injunction was in fact obtained, and the plaintiffs' interest in the land had meanwhile determined. The railroad had taken possession in good faith, but without making compensation. The Chancellor said: "I certainly entertain the impression that on questions of this kind where there is a doubt about the jurisdiction, or whether the court ought to interfere both for the sake of the plaintiff and the defendant, the court ought to stretch, rather than to narrow its jurisdiction, and that finding a question actually raised upon the pleadings which either party has a right to have decided, it ought not to send a plaintiff who has fairly brought that question before the court to pursue his relief elsewhere," and so an inquiry was ordered as to the sum proper to be awarded the plaintiff in respect of the damages for the matters complained of in the bill.

Here the plaintiff has established every allegation, and the items of damage allowed by the referee were fairly claimed by him in his complaint; all his lots had been sold at the time of the trial, and in such a case it would seem that all damages naturally resulting from the wrongful act of the defendant, or directly traceable thereto, might be recovered. Nothing is so clearly established as the item of damage now in question and it was the inevitable result of the defendant's act. The plaintiff's land was, before the defendant entered upon it, subdivided into village lots, and designed for sale; the use of the street was essential, and any interference with it would lessen the value of the lots in the market. Such was the consequence, as found by the referee, of the construction and use of this railroad. The sales were less productive, and damage fell upon the plaintiff by reason of the depreciation so caused. Neither the character of the property, its location in respect to the street, nor the intentions of the owner in regard to it, can be overlooked; that his earliest intention was to sell; that it was prepared for sale, and sold, must be considered; and that the value was diminished by the direct act of the defendant. If these questions had arisen upon proceedings by the defendant to acquire the right which it has unlawfully taken, they would properly have been answered in favor of the landowner. He would receive an award, *first*, for the full value of the land taken, and *second*, a fair and adequate compensation for all the injury he had sustained, or would sustain by the making of the railroad over or across his lots.¹ And it would have been proper to ascertain, and for that purpose determine what effect the change made by the defendant in converting the street into a railroad track, would have upon the plaintiff's land. In *Troy and Boston R.R. Co. v. Lee*,² the

¹ *Kyle v. A. and Roch. R.R. Co.*, 2 Barb. Ch. 489.

² 13 Barb. 169.

court on reviewing a report of commissioners under the railroad act say: "The true rule, the only rule which will do equal justice to all parties is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth after the improvement is made?" following Bronson, J., In the Matter of Furman Street.¹ The rule itself is approved in many subsequent cases, and in the Alb. N. R. Co. v. Lansing,² it is said: "They" (the commissioners) "were to consider how the taking of the land . . . would affect the residue of the owner's land. Would it leave that residue in an inconvenient, unmarketable shape? If so, this fact might properly be taken into the account in determining the amount of compensation. Thus if the land to be taken should lie between the owner's house and the highway, the amount of compensation should be vastly more than for the same quantity of land, equally valuable in itself, but situated in some remote part of the owner's premises." And it was held that the commissioners were therefore right in including compensation to the adjacent land by reason of such taking.

It is, however, objected that the plaintiff should have in this action no damages save for the actual trespass up to the time of bringing the action, and should by successive actions have accruing damages, for the maintenance of the railroad, subsequent to the commencement of the action, or only nominal damages for the original trespass until by the action of ejectment he has possession, and that for damages for the depreciation in value above referred to he should wait until the defendant institutes proceedings to acquire title under the statute relating to that matter. If that is so, a court of equity is powerless, the multiplicity of actions not prevented, and a new and altogether useless litigation encouraged for no good purpose. I think the objections not tenable, and discover no reason for denying any relief to which the plaintiff would in any action, or before any tribunal, be entitled. The defendant has, for the purposes of its incorporation, entered upon an exclusive and permanent occupation of the land; embedded therein its track, and is enjoying it as fully as if the right to do so had been legally secured; in that event compensation must have been made to the owner, and the two things concurring, the title of the defendant would be complete, and the owner legally satisfied. The same result should be reached in this proceeding. The parties are before the court; they have had their day. Those matters have been passed upon which might have gone before commissioners under the statute, and for every trespass the plaintiff may recover in this action. For

¹ 17 Wend. 649.

² 16 Barb. 71.

that reason only was it entertained. No doubt an action might have been brought for the original trespass, in entering and placing the railroad structures upon the land, and other successive actions for continuing it, for in such a case it is said that recovery of damages in the first action by way of satisfaction for the wrong, would not operate as a purchase of the right to continue the injury.¹ Yet in that case the facts were different. In the first action,² it was charged that the defendant's embankment obstructed the plaintiff's approach and access to his lands, and house; and so set back the water as to inundate the dwelling-house, etc. The second action was for a similar injury, but in neither was there any suggestion that the land affected was injured in its market value, or in that respect depreciated. The elements were lacking which lie at the foundation of the case at bar. The injuries were temporary and occasional, and for aught that appears the cause might be removed. But even in that case it was held that if the action was sustainable merely upon the ground that the plaintiff was deprived permanently, by the defendant, of the use of the highway, or that the obstructions were necessarily permanent, the plaintiff would be entitled to prospective damages for that deprivation,³ as explained in *Plate v. N. Y. C. R.R. Co.*⁴ In the case last cited, the difference is indicated between permanent and temporary obstructions. There the land of the plaintiff was flooded as in the Mahon Case, and the court say: "The cause of the injury may be abated, or removed, so that the plaintiff might never again sustain any injury, or from some fortunate change of circumstances the plaintiff's land might never again be flooded."

In the case at bar the injurious consequence was single, the result of one wrongful act, and could not be divided or estimated from day to day; it was not temporary, but permanent. The street was practically taken away so far as its uses as a street were concerned, and the injury was direct as affecting the property of the plaintiff,⁵ and the immediate depreciation of its value. In *The Town of Troy v. The Chesire R.R. Co.*,⁶ while it was held that the plaintiff could recover only for the damages which had been sustained at the time of the commencement of the suit, yet it was considered that all the damages which the plaintiff had sustained, or could sustain, accrued when the defendant's road was built, and that only one recovery could be had; the court in that case say: "Whenever the nuisance is of such a character, that its continuance is necessarily an injury, and when it is of a

¹ *Mahon v. N. Y. C. R.R.*, 24 N. Y. 658.

² *Lalor's Supplement*, 156.

³ 24 N. Y. 658.

⁴ 37 N. Y. 476.

⁵ *Beckett v. The Midland Railway Co.*, L. R. (3 C. P.) 81.

⁶ 3 Foster (23 N. H.) 83.

permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means," and there are other cases to the same effect. And there are cases to the contrary, some holding under circumstances not unlike those presented in this case, that the measure of damages is not the amount the premises had been lessened in value by the trespass, but the difference in value for their use without the railroad track, and with it, from the date of the trespass to the commencement of the suit. They are, however, cases at law, and are not to be reconciled. The conflict between them fully justifies the observation of a learned text writer that the whole law on the subject of damages in the case of continuing nuisances or trespasses, is in a very unsatisfactory state,¹ but it needs no further discussion here, for even if it would be otherwise in actions at law, I have no doubt the plaintiff's damages, however viewed, may be assessed in equity, for a measure may be applied according to the jurisdiction of the court. In *Corning v. Troy Iron and Nail Co.*,² the plaintiffs sought an injunction, and damages by reason of the diversion of water. Hogeboom, J., says: "It is said an action at law lies to recover the damages. . . . If so, such actions may be indefinitely repeated, and each successive day may witness the commencement of a new one. Which is the least burdensome to the defendants, a single action settling the entire right, and affording comprehensive relief, or a succession of suits involving the defeated party in heavy costs?"³ He adds: "The resort to an equitable forum makes the relief comprehensive, and avoids a multiplicity of suits." In the same case on appeal,⁴ Grover, J., says: "It may now be assumed as settled, that the plaintiffs can in the same action obtain all the relief to which the facts entitle them, growing out of the diversion of the water, whether such relief was legal or equitable, or both." A further ground, he says: "Requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiff will be to commence suits from day to day," adding, "all the relief to which a party is entitled arising from the same transaction, may under the Code be obtained in one suit."

This doctrine is of little practical importance if the power of a court of equity to give damages, when it has acquired jurisdiction, is confined to cases in which the plaintiff could recover damages at

¹ Mayne on Damages (2d ed.) 64.

³ Id 326.

² 39 Barb. 326.

⁴ 40 N. Y. 191.

law, or if it is to measure them by the same rule. It is not. In Mayne on Damages,¹ the learned author, speaking of the assessment of damages in the Court of Chancery, says: "The damages awarded differ from those which could be obtained at law, in being given by way of compensation for permanent injury once for all, not as at law where successive actions may be brought, and damages recovered *toties quoties*."² In *Watson v. Hunter*,³ Chancellor Kent says: "The remedy for waste already committed is merely incidental to the jurisdiction assumed to prevent multiplicity of suits, and to save the party from resorting to trover at law," and citing *Jesus College v. Bloom*,⁴ says: "The ground for coming into chancery was to stay waste, and not for satisfaction for the damages, as the commission of waste was a tort, and the remedy at law; but to prevent multiplicity of suits, the court would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to an action at law." To the same effect is *Smith v. Cooke*;⁵ *Bird v. The W. and M. R.R. Co.*⁶ These views are also sustained by the decision of this court upon the first appeal. After discussing the rights of the respective parties, Selden, J., says: "It follows that the defendants in constructing their road upon Washington Street without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were guilty of an unwarrantable intrusion, and the trespass upon his property, and he is entitled to relief," and indicating, as it seems to me, the measure of relief, the learned judge says: "Although he had a remedy at law for the trespass, yet as the trespass was of a continuous nature he had a right to come into a court of equity, and to invoke its restraining power." Why? To prevent a multiplicity of suits, and can of course recover his damages as incidental to this equitable relief. And this general rule is well stated by Earl, J., in a recent case.⁷ "It is," he says, "the practice of courts of equity, where they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." Again the court as one of equity may not only render full compensation to the plaintiff, but may do it on such terms as will secure to the defendant, rights corresponding to those given by the statute as a consequence of proceedings to acquire the right they have wrongfully taken. It has been done in this

¹ Page 465.

² Citing the language of Lord Cransworth in *Stokes v. The City Offices Co. (limited)*, 13 L. T. (N. S.) 81; and see 2 Story's Eq. Jur. § 994.

³ 5 John. Ch. 169.

⁴ 3 Atk. 262.

⁵ 3 Atk. 381.

⁶ 8 Richardson Eq. 46.

⁷ *Mad. Ave. Bapt. Church v. Bapt. Church in Oliver St.*, 73 N. Y. 95.

case. If the defendant complies with the conditions of the judgment, it is protected to the largest extent in the enjoyment of the roadway, and can be no longer, or in any other action, vexed. If it does not accept the conditions and chooses to proceed under the statute, the record of this judgment will prevent the allowance of any damages for injury to the land not actually taken, or for any cause covered by its provisions,¹ and leave the defendant liable only for those which may be assessed for the roadway.

The judgment should be affirmed, with costs.

All concur, except Earl, J., dissenting.

Judgment affirmed.

ERHARDT *v.* BOARO AND OTHERS.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 2, 1885.

[*Reported in 113 United States Reports 537.*]

THE facts which make the case are stated in the opinion of the court.

Mr. Elihu Root for appellant.

Mr. T. M. Patterson and *Mr. C. S. Thomas* for appellees submitted on their brief.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity ancillary to the action for the possession of the mining claim just decided. It is brought to restrain the commission of waste by the defendants pending the action. The bill sets forth the discovery by one Thomas Carroll, a citizen of the United States, while searching on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral on vacant unoccupied land of the United States, of the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, the posting by him in his name and that of the plaintiff, at the point of discovery, of a notice that they claimed 1,500 feet on the lode, the intrusion of the defendants upon the claim, their ousting the locators, and other facts which are detailed by the record in the case decided, and the commencement of the action at law. It also alleges that the defendants were working the claim, and had extracted from it one hundred and fifty tons, or thereabouts, of ore, containing gold and silver of the value of \$25,000, and that about one hundred tons remain in their possession on the premises. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, un-

¹ *Vedder v. Vedder*, 1 Denio 257.

til the final determination of the action at law. The principal facts stated in the bill are supported by affidavits of third parties. The court granted a preliminary injunction, but, after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the court the case is brought here by appeal.

It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pills-worth v. Hopton*,¹ which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench "that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title.²

As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.

The decree of the court below must, therefore, be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered.

¹ 6 Vesey 51.

² *Jerome v. Ross*, 7 Johns. Ch. 315, 332; *Le Roy v. Wright*, 4 Sawyer 530, 535.

SILAS L. GRIFFITH v. JOHN H. HILLIARD.

IN THE SUPREME COURT OF VERMONT, OCTOBER, 1890.

[Reported in 64 *Vermont Reports* 643.]

BILL for an injunction to restrain the cutting of timber. Heard at the September term, 1890, Rutland County, upon the demurrer embodied in the defendant's answer. Taft, Chancellor, dismissed the bill. The orator appeals.

J. C. Baker for the orator.

H. A. Harman for the defendant.

The opinion of the court was delivered by

START, J. The defendant, John H. Hilliard, by the demurrer contained in his answer, claims that a court of equity has no jurisdiction of the matters alleged in the bill. The bill alleges, among other things, that the orator is the owner of the land in question; that its substantial value is made up of the wood and timber growing thereon; that some of the defendants, under a license from the defendant Hilliard, have entered upon the land, are engaged in cutting and drawing timber therefrom, and threaten to continue to do so.

For the purpose of determining the question now before the court, these allegations must be taken as true. To permit this wood and timber to be cut in the manner the defendants are doing, and threatening to do, under a license from defendant Hilliard, is to permit a destruction of the orator's estate as it has been held and enjoyed. The power of a court of equity to interpose by injunction to prevent irreparable injury and the destruction of estates is well established, and this power has been construed to embrace trespasses of the character complained of in the orator's bill.

Where trespass to property consists of a single act, and it is temporary in its nature and effect, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if, as in this case, repeated acts are done or threatened, although each of such acts, taken by itself, may not be destructive to the estate or inflict irreparable injury, and the legal remedy may, therefore, be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction.¹

¹ *Smith v. Rock et al.*, 59 Vt. 232; *Langdon v. Templeton*, 61 Vt. 119; *Erhardt v. Boaro et al.*, 113 U. S. Sup. Ct. 537; *The West Point Iron Co. v. Reymert et al.*, 45 N. Y. 703; *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165; *Irwin v. Dixon et al.*, 9 Howard 28; *Livingston v. Livingston*, 6 John. Ch. (Law. Ed.) 496; *High on Injunctions*, 724-727; *Shipley v. Ritter*, 7 Md. 408 (61

In the case of *Murphy v. Lincoln et al.*,¹ the bill charged the committing of several trespasses by the defendants by drawing wood and logs across the orator's land. The defendants claimed a right of way. The court found the issue of fact in favor of the orator and held that a court of equity had jurisdiction to enjoin the commission of a series of trespasses, although the legal remedy be adequate for each single act if it stood alone.

It is said by Judge Story in his work on Equity Jur.,² "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interpose at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. In short, it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited right with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property."

In the *West Point Iron Co. v. Reymert et al.*,³ it is said that mines, quarries, and timber are protected by injunction, upon the ground that injuries to, and depredations upon, them are, or may cause, an irreparable damage, and, also, with a view to prevent a multiplicity of actions for damages, which might accrue from continuous violations of the rights of the owners; and that it is not necessary that the right should be first established in an action at law.

In *Erhardt v. Boaro et al.*,⁴ Mr. Justice Field says: "It is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

When it appears that the title is in dispute, the court may, in its discretion, issue a temporary injunction and continue it in force for

Am. Dec. 371); *Scudder v. Trenton Delaware Falls Co. et al.* (23 Am. Dec. 756); 1 N. J. Eq. 694; 1 Pomeroy's Eq. Jur., sec. 245; 3 Pomeroy's Eq. Jur., sec. 1357; *Murphy v. Lincoln et al.*, 63 Vt. 278.

¹ [63 Vt. 278.]

³ [45 N. Y. 703.]

² Vol. 2, ss. 928 and 929.

⁴ [113 U. S. Sup. Ct. 537.]

such time as may be necessary to enable the orator to establish his title in a court of law, and may make the injunction perpetual when the orator has thus established his title; or the court may proceed and determine which party has the better title; or it may dismiss the bill and leave the orator to his legal remedy.¹

In Bacon *v.* Jones,² Lord Cottingham says: "The jurisdiction of this court is founded upon legal rights; the plaintiff coming into court on the assumption that he has the legal right, and the court granting its assistance on that ground. When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit or at the hearing; and, in both cases, I apprehend great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open; the court may at once grant the injunction *simpliciter*, without more; a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice, in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant, in the meantime, keeping an account. Which of these several courses ought to be taken, must depend entirely upon the discretion of the court, according to the case. When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established, these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless, it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted,

¹ Bacon *v.* Jones, 4 Mylne & Craig 433; The Duke of Beaufort *v.* Morris, 6 Hare 340; Campbell *v.* Scott, 11 Simons 31; Kerr on Injunctions, 209; Ingraham *v.* Dunnell *et al.*, 5 Met. 118; Rooney *v.* Soule, 45 Vt. 303; Wing, Admr., *v.* Hall *et al.*, 44 Vt. 118; Lyon *v.* McLaughlin, 32 Vt. 423; Hastings, Admr., *v.* Perry *et al.*, 20 Vt. 278; Barnes *v.* Dow, 59 Vt. 530; Barry *v.* Harris, 49 Vt. 392.

² [4 Mylne & Craig 433.]

will do justice between the parties. Again, the court may at the hearing, do that which is the more ordinary course, it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of dismissing the bill at once." Although *Bacon v. Jones* was a case relative to a patent right, the remarks of the Lord Chancellor are applicable to any case in which the orator's title is in dispute.

The case of *The Duke of Beaufort v. Morris*¹ was a bill for an injunction to protect the orator's coal mines from injury from the water flowing into them from the defendant's colliery; and it was ordered that the bill be retained for twelve months, with liberty to the orator to bring such actions as he might be advised were necessary, and that the injunction issued in the cause be continued for such time.

We think the granting of the temporary injunction in this case was a proper exercise of the discretionary power which the court possesses. The orator, by his bill, makes out a strong case for equitable consideration. The sole value of the premises in question is in the wood and timber growing thereon. The orator has heretofore held and occupied them for the purpose of manufacturing lumber and charcoal from such timber and wood. He has expended large sums of money in the erection of mills and coal kilns, in building roads, and in procuring teams and workmen for the prosecution of said business, and has made contracts for the sale of said manufactured products. The defendants are engaged in cutting and removing that which constitutes the chief value of the estate, and threaten to continue to do so. These acts, if continued, will work a destruction of the estate and render it of no value for the purpose for which it has been held and enjoyed. The case is one peculiarly within the province of a court of equity, through its preventive writ to interpose and stop the mischief complained of and preserve the property from destruction.

The defendant, John H. Hilliard, having, before any evidence has been taken or hearing had, put in issue the orator's title, insisted that this issue be tried in a court of law, the case is one in which the court may properly, in its discretion, require the orator to establish his title in such court before proceeding further with the cause; and such will be the order of this court.

The *pro forma* decree of the Court of Chancery is reversed, the demurrer contained in the answer of the defendant, John H. Hilliard, is overruled, the orator's bill is adjudged sufficient, and defendant

¹ [6 Hare 340.]

Hilliard's answer is ordered brought forward, from which it appears that the orator's title to the premises is in controversy; therefore, the cause is remanded to the Court of Chancery, with direction to that court to retain the cause and continue in force the injunction for such time as, in the opinion of said court, may be necessary to enable the orator to bring and prosecute to final judgment such action or actions as may be necessary to establish his title in a court of law. And in default of the orator so establishing his title, within the time aforesaid, the orator's bill to be dismissed, as against the defendant, John H. Hilliard, with costs. But if the orator shall, within the time aforesaid, by a final judgment in his favor in a court of law, establish his title to the premises, as against the defendant, John H. Hilliard, then the court will enter a decree making perpetual the temporary injunction, and make such order in relation to costs as to the court shall seem meet.

Taft, J., did not sit, for reasons stated in *Stetson et al. v. Stevens et al.*¹

JEAN BARON ET AL., RESPONDENTS, *v.* ISIDORE S. KORN,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 2, 1891.

[*Reported in 127 New York Reports 224.*]

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 28, 1889, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Lewis Sanders for appellant.

Carlisle Norwood, Jr., for respondents.

PARKER, J. This is a suit in equity brought to restrain the defendant from erecting a portion of a building on lands to which plaintiffs asserted title; to compel the removal of so much of the foundation wall, as had been constructed at the time of the commencement of the action; to cause the land to be restored to its former condition; and for damages occasioned by the action of the defendant.

The defendant challenged plaintiffs' assertion of title, and alleged title in himself.

¹ [64 Vt. Rep. 649.]

The *locus in quo* is a narrow strip of land nine inches in front on Bleecker street, by seventy-five feet deep, and constituted a part of an alley-way, two feet and eleven and one-half inches in width, occupied and used by the plaintiffs and their predecessors in title for many years prior to the commission of the acts by defendant of which plaintiffs complain.

The plaintiffs' lot, and defendant's lots, were formerly a part of the Bayard farm, which was surveyed and laid out into lots prior to 1818. On Bleecker street, between Macdougal and Sullivan streets, there were eight lots, with a frontage on Bleecker street each of 25 feet, and a depth of 100 feet.

The record title established by plaintiffs, commenced with a deed dated April 22, 1818, by which was conveyed four of such lots, commencing at Macdougal street and being a plot 100 feet square. The trial court has found that this deed did not convey any portion of the nine inches in controversy.

The defendant is the owner of the four remaining lots, and derives his title through John Oothout, to whom they were conveyed by deed, bearing date June 4, 1824, in which they were described as being bounded easterly by Sullivan, and southerly by Bleecker street, "containing together 100 feet on each of the four sides thereof."

Now while it is found that the deed of 1818, through which plaintiffs derive title, did not convey the lands in dispute, it appears from the opinion both at Special and General Term, that those courts regarded the facts as establishing title thereto in the plaintiff, by adverse possessions, and with that view we concur.

As has already been stated John Oothout acquired title to the lots now owned by the defendant in 1824, thereafter, and on October 25, 1838, plaintiffs' lot was conveyed to Leavina Post, the dimensions given were 25 feet front on Bleecker street, with a depth of 75 feet, and its easterly boundary was described as being a lot of ground of John Oothout. This description was followed in the several succeeding conveyances, down to and including the deed to plaintiffs, which bears date March 20, 1883.

A two-story mansard roof, brick-front house, had for more than 40 years stood on the lot, its width on Bleecker street being 22 feet and one-half inch; and the alley-way between it and the easterly wall of defendant's building was two feet eleven and one-half inches in width, together constituting a frontage of 25 feet, which accords with the frontage of said lot on Bleecker street, as given in all the deeds, including and subsequent to the deed of 1838.

More than 40 years prior to this action five houses were erected on the plot of ground now belonging to the defendant, the most easterly

wall thereof constituting during such period the westerly boundary of the alley-way, as maintained and used by the plaintiffs and their predecessors. Such boundary was further maintained by a fence, which was a continuation of the line of the wall extending from the house towards the rear of the lots and to the easterly side of a shed, occupying the rear of the lot claimed by plaintiffs. Within the shed there was a partition wall built in line with the fence, commencing at a point inside the shed opposite the point where the fence met the shed on the outside. Back of the alley-way was a cistern on plaintiffs' premises, which extended easterly up to the line of the wall of defendant's house. There was a door at the entrance to the alley-way on Bleeker street, adjusted to the door frame; the westerly side of the door frame was a strip of wood, fastened to the defendant's house; the door had a lock, and when locked the bolt went into such strip of wood. When the plaintiffs took possession under their deed the key of the alley-way door was given to them, and thereafter kept in their exclusive possession and control. The wall, fence, and alley-way door left the defendant without means of access to any portion of the premises constituting the alley-way.

We have thus briefly alluded to some of the facts found by the trial court, which as we think are adequate to justify a finding, that title to the alley-way had, prior to the commencement of this action, been acquired by adverse possession.

While the trial court entertained the same view, it found as a conclusion of law "that this court sitting in equity, has no jurisdiction of the cause of action sought to be proved in this suit"; and, therefore, directed judgment for the defendant.

Assuming plaintiffs' title to be established, the authority of the court in a suit in equity to interfere and prevent an appropriation of their lands to the use of another for building purposes cannot be longer questioned, not only for the purpose of avoiding multiplicity of actions, but also because they were without adequate remedy at law.

The plaintiff, Jean Baron, was a wholesale wine merchant and importer of wines, which he purchased in casks, using the alley-way for the purpose of conveying the casks from the street to the rear of the yard, thence they were taken into his cellar for bottling, and this the erection of defendant's wall would wholly prevent.

This special injury could not well be provided for by any rule of damages. Again, it would be impracticable, if not impossible, for the plaintiffs in ejectment to regain actual possession of that portion of the alley-way occupied by the wall.

The sheriff might not regard it as his duty to deliver possession by

taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included within the nine inches. But in equity, the obligation to remove can be placed directly on the party who caused the wall to be erected, and it frequently affords preventive relief against the commission of trespasses, such as the excavation of complainants' soil by an adjoining owner; the destruction of his wall in building operations on adjacent premises, and the encroachment on his rights by the diversion of a stream of running water from its natural channel.¹

It appears to have been the view of the trial court that the circumstances of the case made it proper to refuse plaintiffs' relief in equity until after his right to the *locus in quo* had been established at law. Such is the general rule in courts of equity, but it has exceptions.² Judge Finch, speaking for this court in *Wheelock v. Noonan*,³ said that "the modern system of trying equity cases makes the rule less important. . . . Indeed, I am inclined to deem it more of a rule of discretion than of jurisdiction."

If the question whether the plaintiff ought to have been required to establish his title in an action at law, were properly reviewable here, it need not be considered, because the defendant did not, by his answer, object that the plaintiffs had an adequate remedy at law. After parties have submitted to the jurisdiction of the court, the plaintiff will not be turned out to seek his remedy elsewhere, when the objection is taken for the first time at the trial.⁴

The order should be affirmed.

All concur.

Order affirmed.

¹ Story's Equity Jur. §§ 928, 929; High on Injunction, §§ 704, 707; Creely *v.* Bay State Brick Co., 103 Mass. 514; Corning *v.* Troy Iron & Nail Factory, 40 N. Y. 191; Fox *v.* Fitzsimons, 29 Hun 574; *Wheelock v. Noonan*, 108 N. Y. 179; Avery *v.* N. Y. C. & H. R. R.R. Co., 106 Id. 142.

² T. & B. R.R. Co. *v.* B., H. T. & W. R. Co., 86 N. Y. 128.

³ [108 N. Y. 179.]

⁴ Grandin *v.* LeRoy, 2 Paige 509; Wiswall *v.* Hall, 3 Id. 313; LeRoy *v.* Platt, 4 Id. 77; Cox *v.* James, 45 N. Y. 557; Town of Mentz *v.* Cook, 108 Id. 504.

ANDREW WALKER, RESPONDENT, *v.* S. B. EMERSON ET AL.,
APPELLANTS.

IN THE SUPREME COURT OF CALIFORNIA, JUNE 10, 1891.

[*Reported in 89 California Reports 456.*]

APPEAL from a judgment of the Superior Court of Contra Costa County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

A. H. Griffiths and *A. C. Hartley* for appellants.

W. S. Tinning and *W. S. Wells* for respondent.

McFARLAND, J. This action was brought to enjoin defendants from depositing dirt upon plaintiff's land, and from diverting water from plaintiff's canal on his said land, and for damages. Judgment was rendered for plaintiff, enjoining defendants as prayed for, and defendants appeal from the judgment, and from an order denying a new trial.

We think that the evidence supports the findings.

Plaintiff owns a tract of land through which there is an artificial water-way, or canal, about seven feet deep and forty feet wide, which is wholly owned and controlled by plaintiff, and was originally constructed mainly for purposes of navigation. It receives its waters—or most of them—from a slough connected with the San Joaquin River, and is filled and emptied by the flow and ebb of the tides of the Pacific Ocean, although the water which flows into it is river water, and fresh. The appellants divert water from said canal by means of a ditch which they dug through and over plaintiff's land, and connected with the canal by a box. They seem to take the position that when the canal is filled by the influence of the tides, the amount of water in it is inexhaustible, and incapable of being diminished; that therefore the amount diverted by them can do respondent no damage, and that therefore an injunction will not lie. If there is any such principle with respect to water rights, it certainly could be applied only to a case where a party, without intruding upon the possessions of others, and without committing any direct trespass upon another's land, took water from a stream at a point where he had a right to approach it, to the alleged damage of persons claiming water rights at other points on the stream. But there is, clearly, no principle by which a mere intruder can go upon the land of another, and take water from an artificial ditch thereon. Such an act is an injury to the *right*, and if threatened to be continued should be enjoined, whatever opinion persons other than the owner may have about the extent of the damage that may result. “The right to an

injunction, therefore, in such a case does not depend upon the extent of the damage measured by the money standard; the maxim *de minimis* does not apply."¹ It is true that the court finds in one place that plaintiff was not actually damaged by the taking of the water that had occurred, which means, we suppose, that the court could not make any money estimate of such damage; but the court also finds that "if said defendants are not restrained and enjoined from using said water, and conducting the same through said ditch, said use thereof by defendants will ripen into an easement on the part of the defendants, and prevent the unrestricted use of said canal by plaintiff, and cause plaintiff great and irreparable injury." The question of damages is irrelevant. The threatened act of appellants "disturbs the plaintiff's possession, and if permitted to continue, will ripen into an easement. That, of itself, is sufficient to entitle him to an injunction."² The threatened filling up of plaintiff's land with dirt, thus destroying his fruit trees, etc., is of the same character as the digging of the ditch and the diversion of the water; and upon the same principle, such acts were properly enjoined. We see no error in the rulings of the court below.

The judgment and order appealed from are affirmed.

DE HAVEN, J., and SHARPSTEIN, J., concurred.

EDWARD LYNCH v. UNION INSTITUTION FOR SAVINGS AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 3,
1893.

[Reported in 158 Massachusetts Reports 394.]

HOLMES, J. This is a bill in equity, April 16, 1892, to restrain a threatened eviction of the plaintiff by the owner of the fee. The plaintiff is a sublessee, who is found to be in under a lease which was assented to by the predecessor in title of the defendant Institution for Savings, and which is binding on that Institution. It does not expire until the end of November, 1895. The mesne lease has been surrendered. We are to take it that the plaintiff had been injured, and that he was threatened with complete eviction when the bill was filed. The only question intended to be presented by the report is whether

¹ Learned *v.* Castle, 78 Cal. 461, and cases there cited.

² Richards *v.* Dower, 64 Cal. 64.

the injunction should be denied, and the plaintiff confined to recovering his damages, on the ground that the injury of the injunction to the owner would be incommensurate with the benefit to the plaintiff.

The result of denying the injunction is to "allow the wrong-doer to compel innocent persons to sell their right at a valuation."¹ The decision in *Brande v. Grace*² is not an authority for that. There the defendant corporation built a structure on its own land after a decision by the Superior Court that it had a right to do so. When the plaintiffs' lease had but eight months more to run, this court decided that the structure was unauthorized, because it interfered with an implication in the lease that the rooms should continue to open on Tremont Street; but an injunction was refused in view of the early termination of the lease. In the present case the plaintiff's lease has a year and nine months to run. The defendant Institution for Savings is not interfering with a doubtful easement under a mistaken view of its rights. Now, at all events, if not from the beginning, it simply is dispossessing or trying to dispossess a man of his land by wilful wrong, and its argument that it should not be restrained in proceeding must be that it can make more money out of the plaintiff's property than the plaintiff can, if it is allowed to take it.³

If we are to infer, although it does not appear with definiteness, that the defendant Institution has been at some expense already on the plaintiff's premises, we see no reason to doubt that it has acted with knowledge of the plaintiff's rights. What it has done outside of the plaintiff's premises, and not interfering with him, is no concern of his. The defendant Institution's outlay does not better its case on the question of a prohibitory injunction, and we see no reason why it should not be required to restore the premises to their original condition.⁴

Injunction to issue.

S. L. Whipple for the plaintiff.

M. Morton for the Union Institution for Savings.

¹ *Tucker v. Howard*, 128 Mass. 361, 363.

² 154 Mass. 210.

³ See *Goodson v. Richardson*, L. R. 9 Ch. 221, 224.

⁴ See *Tucker v. Howard*, 128 Mass. 361.

(SAME CASE.)

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 20,
1893.

[*Reported in 159 Massachusetts Reports 306.*]

KNOWLTON, J. After the decision in this case, reported in 158 Mass. 394, a hearing was had in the Superior Court in regard to the decree to be entered, and the evidence tended to show that to restore the plaintiff's premises to their former condition would not only involve material and extensive changes in the different parts of the basement of the building, but would require the defendant Institution, which was the owner of the reversion subject to the plaintiff's lease, to remove a vault enclosed in masonry, in which were kept the books of the corporation, leaving unsupported its vault and safe in the banking-room above, in which were kept its securities, bonds, notes, and stocks, representing a value of about \$5,000,000. To do this would cost about \$3,500, and would compel the defendant Institution to find some other place of deposit for the contents of this safe while the work was being done. The portion of the plaintiff's premises occupied by this vault was an alcove or corner of the basement about thirteen by twelve feet in area. This was but a small part of the space covered by the plaintiff's lease, all of which was in the basement. At the hearing, the defendant Institution asked for a decree which would permit it to retain the space occupied by its vault, and to build a brick wall across enclosing the vault, and to give the plaintiff a space somewhat larger than this in the front part of the basement adjoining the portion covered by his lease, and which should also require it to restore to its original condition, so far as possible, all the remainder of his premises. The plaintiff objected, the court made a decree requiring the removal of the vault, and the case comes to this court on the question whether the defendant Institution may be permitted to retain the small space occupied by its vault, and to restore to the plaintiff the remainder of his premises, and to enlarge them by the addition of an equivalent or larger space on the front.

When a plaintiff brings a bill to prevent a continuing trespass or a permanent injury to his real estate, the question whether he shall have a prohibitory injunction, or, if the work affecting the property has been done, a mandatory injunction requiring the restoration of the estate to its former condition, depends on a consideration of all the equities between the parties. In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has

changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages. In such a case the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property. The principal reason for this is that which lies at the foundation of the jurisdiction for decreeing specific performance of contracts for the sale of real estate. A particular piece of real estate cannot be replaced by any sum of money, however large, and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money. A title to real estate, therefore, will be protected in a court of equity by a decree which will preserve to the owner the property itself, instead of a sum of money which represents its value. One who has gone on wrongfully in a wilful invasion of the plaintiff's right in real estate has no equity to set up against the plaintiff's claim to have his property restored to him as it was before the wrong was done. Upon the evidence before us at the former hearing of the present case, it was held that the plaintiff might have a mandatory injunction requiring the defendant Institution to restore the premises to their former condition.¹

On the other hand, where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law.² The doctrines applied by the court of equity in cases of this kind call for a consideration of all the facts and circumstances which help to show what is just and right between the parties. In *Brande v. Grace*,³ where it appeared that the defendant proceeded with full knowledge of the facts, and with notice of the plaintiff's claim, but with good reason to doubt whether the law would recognize such rights as the plaintiff claimed, it was held, when the claim was sustained, that, as the plaintiff's title was only under a lease that had less than a year to run, and as the cost of restoration of the

¹ *Lynch v. Union Institution for Savings*, 158 Mass. 394. See also *Tucker v. Howard*, 128 Mass. 361, and cases cited; *Attorney-General v. Algonquin Club*, 153 Mass. 447, 454.

² *Hunter v. Carroll*, 64 N. H. 572; *Low v. Innes*, 4 DeG., J. & S. 286; *Aynsley v. Glover*, L. R. 18 Eq. 544, 553. See also *Ford v. Knapp*, 102 N. Y. 135; *Thomas v. Evans*, 105 N. Y. 601.

³ 154 Mass. 210.

premises would be greatly disproportionate to the advantages which the plaintiff could derive from the enjoyment of his estate, he should not have a decree for a restoration of the premises, but should be compensated in money. In the case before us, the plaintiff's title is only under a lease, binding on the defendant Institution, which will expire in about a year and a half, and the Institution owns the reversion. It has already been decided that he is to have an injunction, giving him the enjoyment of his premises. He is a mason and builder, and he has used the property heretofore only as a place for the storage of doors, window sashes, and other similar property. He pays as rent for it fifteen dollars per month. Upon evidence taken at the last hearing, it now appears that he can have substantially the same premises without the removal of the defendant Institution's vault. It was conceded by him in his testimony that the change of the small space occupied by the vault for the space proposed to be given him in the same basement adjoining the leased premises on the other side, would not leave his estate in any particular less desirable for any use to which he might wish to put it. In cross-examination he gave as the only reasons for his unwillingness to accept the substituted space, first, that he had not been treated properly by the defendant Institution, and, secondly, that he thought it easier for the Institution to arrange a settlement with him. The decree suggested by the defendant Institution gives the plaintiff substantially the same property which he has sought to recover, and provides compensation for the injury which he has received. The principal reasons for the former decision are fully regarded by the defendant Institution's proposition. It would be inequitable, under the circumstances of this case, to compel the Institution to expend \$3,500, and to suffer in addition great inconvenience and loss in its business, simply to enable the plaintiff to enjoy for a year and a half the use of the basement, including the space in one corner thirteen by twelve feet, instead of the same basement without that space and with a greater space added to it on the opposite side towards the front. The case shows no such deliberately wrongful conduct on the part of the defendant Institution as should deprive it of the benefit of equities such as these. The evidence tends to show that the Institution did not believe the plaintiff's claim to be valid until it was shown to be so at the first hearing, and at that time the work had so far advanced that the judge who heard the case thought it equitable to apply the rule laid down in *Brande v. Grace*,¹ and to hold that the plaintiff should not have an injunction, but should be compensated in money. After the decision to that effect in the Superior Court, the defendant

¹ 154 Mass. 210.

Institution finished the work. This court thought the Institution should be held more strictly; but it is enough, under the facts shown at the final hearing, if the plaintiff receives the premises substantially as they were before the work was begun, so that they are as good for every kind of use to which he can put them during the remainder of the short term which his lease runs, and if he also receives full compensation in money for all the injuries which he has suffered. This principle, which calls for a consideration of all the equities, has repeatedly been applied in the same way in analogous cases.¹

The decree must be modified in accordance with the defendant Institution's proposition, which appears in the report, on the Institution's renewal of that proposition in the Superior Court.

Decree accordingly.

R. M. Morse for the Union Institution for Savings.

S. L. Whipple for the plaintiff.

¹ *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Morse v. Hill*, 136 Mass. 60, 70; *Attorney-General v. Algonquin Club*, 153 Mass. 447, 455.

CHAPTER VII.

NUISANCE.

THE ATTORNEY-GENERAL *v.* NICHOL.

IN CHANCERY, BEFORE LORD ELDON, C., NOVEMBER 6, 7, AND 9,
1809.

[*Reported in 16 Vesey 338.*]

THE object of this information, filed at the relation of the Scottish Hospital, was to restrain the defendant from building up a certain wall, erection, or building, above the height of sixteen feet, and thereby obscuring and darkening the ancient lights of the Scottish Hospital.

An injunction was obtained on the 15th of July, without notice, upon affidavit and certificate of the information filed. The hospital is situated in Crane Court, Fleet Street; where the defendant occupies some adjoining premises, for the purpose of carrying on his business as a printer: the wall, which was the subject of complaint, being, not opposite, but at right angles with the hospital. The affidavits represented, that the relators gave notice to the defendant not to raise the wall higher than sixteen feet; that notwithstanding that notice he proceeded; and had carried it up to twenty feet; that the ancient windows of the hospital are by this wall darkened and obscured; and if it should be carried higher, they will be to a greater degree darkened and obscured; and so much as materially to affect the value of the premises. The relators had brought an action.

The writ of injunction was dated the 22d of July, and was served on the defendant on the 1st of September following, but the defendant was never served with any writ of subpoena to appear and answer the information.

Sir Samuel Romilly, at the second seal before the term, moved, upon notice, that the information might be dismissed, and the injunction dissolved, on the ground, that no subpoena had been served.

Sir Arthur Piggott, Mr. Alexander, and Mr. Clason, showed cause against dissolving the injunction; contending, that in these cases of special injunction it is not necessary to serve the writ of subpoena; as the defendant, having notice of the information by service of the

injunction, might appear gratis; and put in his answer; the form of the injunction being, "until the defendant appear, and full answer make"; and accordingly, the practice in these cases is not to serve a subpœna.

Sir Samuel Romilly, and Mr. Joseph Martin, for the defendant, contended, that the subpœna ought to be served in all cases; and the injunction ought to be dissolved for want of it in this case.¹

The Lord Chancellor appeared to think, that the subpœna ought to have been served; but refused to dissolve the injunction; and in this case the party was misled as to the practice, and in fact the practice seemed to have been both ways.

Sir Samuel Romilly then proposed to go into the merits; for the purpose of dissolving the injunction: the defendant having, when the motion was originally made, produced an affidavit upon the merits, as to his right to erect the building or alleged obstruction in question.

The counsel for the information objected to the defendant being heard on the merits on affidavit; or until he put in his answer.

The Lord Chancellor² held, that the defendant in this case was entitled to be heard on affidavit; as the relators, not having served the subpœna, should be considered as having waived their right to an answer; and that in these cases, where no subpœna was served, it was competent to the defendant to come to the court to dissolve the injunction upon the merits, disclosed by affidavit.²

The motion for dissolving the injunction accordingly proceeded upon the merits.

Sir Samuel Romilly, and Mr. Joseph Martin, for the defendant, in support of the motion. The jurisdiction by injunction against stopping up ancient lights, notwithstanding the common law remedy by action, or otherwise, is not disputed: but for that purpose the effect of the erection must be a total deprivation of light: not merely an obstruction: so that the plaintiff has not so much light as he previously enjoyed. The ground for the interference of this court by injunction is irreparable injury to every useful purpose: not merely the inconvenience, that may be sustained by intercepting the light in a certain degree. This, if once admitted, may be pushed to a great extent. The addition of one story to a house in a narrow street must in some degree darken the opposite houses. In the Fishmonger's Company *v.* The East India Company³ Lord Hardwicke's reasoning does not apply to the distinction between an injunction

¹ *Patrick v. Harrison*, 3 Bro. C. C. 476.

² The judgment on these two points *ex relatione*.

³ 1 Dick. 163.

and ordering the wall to be taken down; and the application was refused as to both objects.

The circumstances of this case are peculiar. There is an area of eighteen feet in front; and this building is, not directly in front, before the windows of the hospital, but on one side, at right angles, with an interval of seven feet; diminishing certainly, but not excluding, the light. The single question is, whether this is a nuisance; and, if there is any doubt, the court will not interpose in this summary way.

Sir Arthur Piggott, Mr. Alexander, and Mr. Clason, for the relators, argued, that the right to an injunction cannot depend upon the position, or the distance, of this building; nor is it necessary, that the light should be wholly intercepted; if, as the affidavits state, the effect is, that these ancient lights are darkened and obscured; and, if the building shall be carried higher, will be in a greater degree darkened and obscured; so much as materially to affect the value of the premises.

THE LORD CHANCELLOR. With regard to the jurisdiction of this court, many of the circumstances that have been pressed in the argument, lay no foundation for it. Cases may exist, upon which this court could not interfere, yet an action upon the case might be very well maintained. The wall between a man and his neighbor may belong to the one, both in respect of property and the obligation to repair; and yet the other might support an action on the case for making a window in it, or for raising the wall; but the consequence does not follow, that a court of equity has any jurisdiction. The foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke,¹ that sort of material injury to the comfort of the existence of those, who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. Assuming, therefore, that from circumstances of enjoyment, usage, or interest, some contract could be implied, that this defendant should not build upon the premises he occupies, to the east of the hospital, and that an action on the case could be maintained upon that ground, that would not induce this court to interpose by injunction; unless the consequences

¹ Dick. 164.

of the act, which may be represented as illegal, being a violation of contract, express or implied, appeared to be such as should be, not merely redressed, but prevented by application of the peculiar means of this court.

I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground; and there is as little doubt, that this court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings, darkening those opposite to them, but not in such a degree that an injunction could be maintained; or an action upon the case; which however might be maintained in many cases which would not support an injunction. These affidavits therefore, stating only, that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do. Further, the affidavits and the information regard only the case of a perpendicular building, with a wall twenty feet high; which might have an effect so injurious, that it would be restrained; though a lower elevation, with a sloping roof, would let in so much light, that the interposition of this court would not be justified: and upon the proposal, now made, limiting the wall to sixteen feet, I have no rule for determining to what elevation under twenty feet it may be carried without any injurious effect. Considering also the particular circumstances in which the defendant is represented as standing with reference to his business, and that they have got so near a decision,¹ which I should be very unwilling by my interference to retard, I will dissolve this injunction; the defendant undertaking, if upon the trial, promptly had, the verdict shall be against him, to remove such building as shall be proved in a material and improper degree affecting these ancient lights.

The defendant gave the undertaking accordingly.

GARDNER v. THE TRUSTEES OF THE VILLAGE OF
NEWBURGH ET AL.

IN THE COURT OF CHANCERY OF NEW YORK, AUGUST 22, 1816.

[*Reported in 2 Johnson, Chancery, 162.*]

THE bill, which was for an injunction, stated, that the plaintiff is owner of a farm in the village of Newburgh, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant, Hasbrouck, and after entering the plaintiff's land, continues its whole course through his farm

¹ An action on the case by the hospital was depending.

until it empties into the Hudson River. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick-yard on the farm of the plaintiff, where most of the bricks used in Newburgh are made; it also supplies a large distillery erected by him at great expense, and a churning-mill, and water for a mill-seat, where the plaintiff is about to erect a mill for grinding plaster of paris. That the trustees of the village of Newburgh, the defendants, by false representations, obtained an act of the Legislature, passed the 27th of March, 1809, to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees having obtained leave from the defendant, Hasbrouck, the owner of the stream, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit, and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, etc. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, etc. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick-yard, etc., of the plaintiff, and if diverted through a pipe, or tube, of the proposed diameter, would greatly injure, if not render the works useless. One of the affidavits stated, that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

Burr and J. V. N. Yates for the plaintiff.

The CHANCELLOR.¹ The statute under which the trustees of the village of Newburgh are proceeding,² makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land, the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it,

¹ James Kent.—ED.

² Sess. 32, ch. 119.

without his consent, or without making him a just compensation. The act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a watercourse is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy.¹

The court of chancery has also a concurrent jurisdiction, by injunction, equally clear and well established in these cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In *Finch v. Resbridger*,² the Lord Keeper held, that after a long enjoyment of a watercourse running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in *Bush v. Western*,³ a plaintiff who had been in possession, for a long time, of a watercourse, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented.⁴

In the application of the general doctrines of the court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other

¹ F. N. B. 184; *Moore v. Browne*, Dyer 319 b; *Lutterel's case*, 4 Co. 86; *Glynne v. Nichols*, Comb. 43; 2 Show. 507; *Prickman v. Trip*, Comb. 231.

² 2 Vern. 390.

³ Prec. in Ch. 530.

⁴ Anon. 1 Vern. 120; *East India Company v. Sandys*, 1 Vern. 127; *Hills v. University of Oxford*, 1 Vern. 275; Anon. 1 Vesey 476; Anon. 2 Vesey 414; *Whitchurch v. Hide*, 2 Atk. 391; 2 Vesey 453; *Attorney-General v. Nichol*, 16 Vesey 338.

right to the stream (assuming, for the present, the charges in the bill), than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be dispossessed "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *magna charta*, and which the Legislature has incorporated into an act declaratory of the rights of the citizens of this State.¹

I have intimated that the statute does not deprive the plaintiff of the use of the stream until recompence be made. He would be entitled to his action at law for the interruption of his right, and all his remedies at law, and in this court, remain equally in force. But I am not to be understood as denying a competent power in the Legislature to take private property for necessary or useful *public* purposes; and, perhaps, even for the purposes specified in the act on which this case arises. But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

Grotius,² Puffendorf,³ and Bynkershoeck,⁴ when speaking of the *eminent domain* of the sovereign, admit that private property may be taken for public uses, when public necessity or utility require it; but they all lay it down as a clear principle of natural equity, that the individual whose property is thus sacrificed must be indemnified. The last of those jurists insists that private property cannot be taken, on any terms, without consent of the owner, for purposes of public ornament or pleasure; and, he mentions an instance in which the Roman senate refused to allow the *prætors* to carry an aqueduct through the farm of an individual, against his consent, when intended

¹ Laws, sess. 10, ch. 1.

² De Jur. B. & P., b. 8, ch. 14 s. 7.

³ De Jur. Nat. et Gent., b. 8, ch. 5, s. 7. ⁴ Quæst. Jur. Pub., b. 2, ch. 15.

merely for ornament. The sense and practice of the English Government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the Legislature. And how does the Legislature interpose and compel? "Not," says Blackstone,¹ "by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."

I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the State, unless a just indemnity be afforded, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the Constitutions of the States of Pennsylvania, Delaware, and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe.² But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the Constitution of the United States, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the Legislature never intended, by the act in question, to violate or interfere with this great and sacred principle of private right. This is evident from the care which this act bestows on the rights of the owners of the spring, and of the lands through which the conduits are to pass. These are the only cases in which the Legislature contemplated or intended that the act could or should interfere with private right, and in these cases due provision is made for its protection, or for compensation. There is no reason why the rights of the plaintiff should not have the same protection as the rights of his neighbors, and the necessity of a provision for his case could not have occurred, or it, doubtless, would have been inserted. Until, then, some provision be made for afford-

¹ Com., vol. 1, p. 139.

² Constitutional charter of Louis XVIII. and the ephemeral, but very elaborately drawn constitution *de la République Française* of 1795.

ing him compensation, it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of this statute, to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water.

In the case of *Agar v. The Regents' Canal Company*,¹ an injunction was granted, on filing a bill supported by affidavit, restraining defendants acting under a private act of Parliament, from cutting a canal through the land of the plaintiff, in a line and mode not supposed to be within the authority of the statute.

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied.

Injunction granted.

SAMUEL McCORD AND F. E. HUNT *v.* CHRISTIAN IKER.

IN THE SUPREME COURT OF OHIO, DECEMBER TERM, 1843.

[Reported in 12 Ohio Reports 387.]

THIS is a bill in chancery, to abate a private nuisance, from Champaign County.

The complainants allege that they are the owners of a tract of land upon which are two bodies of water, called Big and Little Lakes, through which flows a stream called Musquito Creek; that on said creek, one mile and a quarter from the lands of complainants, the defendant has erected a milldam, and a saw and grist mill; that, by the erection of said milldam, the waters are flowed back upon the lands of the complainants; that complainants have, by two suits at least, established their rights at law; but that the courts of law furnish no adequate relief, and, therefore, the interposition of the extraordinary powers of a court of chancery are invoked. The prayer of the bill is for a perpetual injunction, and a decree that said milldam may be pulled down and abated.

John W. Andrews for complainants.

Mason and Tarbert for defendant.

READ, J. The ground upon which the interference of a court of equity is invoked, is, that the mischief to complainants' property is irreparable, and that actions at law furnish no adequate relief.

Whilst this is an admitted ground of equity jurisdiction, courts of chancery will carefully abstain from interference, where the injury will support an action at law, unless the party seeking such aid brings

¹ Cooper's Eq. Rep. 77.

himself within the clearest principle of equitable relief. But if it be necessary to prevent a permanent injury to property, or its entire ruin, from the erection and continuance of a nuisance, and the law cannot prevent the evil, equity will interfere, although the property itself may be of small value.

But, in cases of this sort, equity will not interfere until the right and the facts have been established, beyond doubt, at law.

In the case now under consideration the injury, if any, is trifling. The complainants have prosecuted nine suits at law. Two verdicts have been recovered in their favor, on appeal to the Supreme Court: the one for \$2.50, the other for one cent. Since then the complainants have sold their right to the land, except from five to seven acres, in different parcels. The complainants reserved, at the time of sale, the right to raise the water in the lakes to high-water mark. They do not own any land now flooded by defendant's dam, unless it may be some portion of the five or seven acres not parted with. To what extent their land may be injured, or whether at all, is matter of doubt. They have reserved the right to keep the water at high-water mark merely, and if the water remains at that point it may be well asked, what injury do the complainants sustain? It may be inquired, too, whether the five or seven acres that, it is contended, were not conveyed by the complainants, is flooded at all by the dam of defendant? It may then be well supposed that the complainants are suffering no injury from the dam of defendant, and are, therefore, not entitled to the relief sought.

Even when the complainants owned the whole land, some of the witnesses swear that no injury was sustained; and the whole testimony, and the trials at law, prove that the injury, if any, was merely nominal, or scarcely above it.

In the case of *Cooper v. Hall*,¹ the court decide that, in case of water flowed back in the bed of a stream, no action lies unless some damage be sustained.

In this case the water is flowed over a few acres of low, swampy, wet prairie, of little or no value.

A court of equity would hardly be warranted in interfering to the destruction of a mill, in a case where the damages sustained by flowage were barely nominal, but would leave the parties to their remedies at law. Nor would it be warranted in such case, to found jurisdiction upon the fact, that the injury was too trifling to carry costs in an action at law. But where the nuisance is of such a character as to occasion a personal inconvenience or annoyance, it would present a totally different case. But equity has no respect for a litigious spirit

¹ 5 Ohio Rep. 322.

which seeks the injury of another without benefit to itself. Equity will not controvert the policy of the law, and found its jurisdiction upon the fact, merely, that the law so far discourages trifling litigation as to give no costs. We cannot say in such case that the remedy is not equal to the injury. Where the injury complained of is irreparable, going to the ruin or destruction of the property, equity will interfere. We wish to lay down no rule which will at all interfere with this wholesome and necessary principle, but we must say that the present case does not warrant its exercise.

This mill was erected before complainants acquired any interest in the land; the damages at farthest are of a very trifling character, if not merely nominal; and a majority of all the verdicts, taking the trials in both courts, find for the defendant. And since the complainants have parted with the land, except as to a small parcel, and reserving only the right to keep the water up to high-water mark upon that which they have sold, two verdicts have been rendered against them in the Court of Common Pleas.

Bill dismissed at complainants' costs.

ELMHIRST *v.* SPENCER.

IN CHANCERY, BEFORE LORD COTTONHAM, C., DECEMBER 5 AND 6,
1849.

[*Reported in 2 MacNaghten and Gordon 45.*]

THIS was a motion, by special leave, on the part of the defendants, to discharge an order of the Vice-Chancellor of England, made on the 4th December, 1849, whereby the defendants were restrained from interrupting or disturbing the plaintiff in the free use of certain streams or watercourses flowing through the plaintiff's lands, and from fouling such waters, and from continuing to divert, turn, or change the channels, beds, or courses of the said streams or watercourses from their ancient channels respectively, and from casting into the same streams or any of them any foul or impure water, dirt, filth, or any other noxious or contaminating matters whereby to foul or render unfit for its ordinary use the waters of the said streams, and from otherwise damaging or injuring the plaintiff in the rightful enjoyment of the flow and use of the said streams into, through, over, along, and across the plaintiff's land.

From the statements in the bill, which was filed on the 10th October, 1849, it appeared,—that from time immemorial certain brooks or watercourses had flowed through the plaintiff's lands, two

of which were derived from and passed through the lands occupied by the defendants; that the plaintiff's lands were used for agricultural purposes; that in 1848 the defendants had erected certain bleaching works on their premises, which adjoined the plaintiff's lands; and that the defendants, in the prosecution of this business, used and employed, and at the date of the bill were using and employing, certain deleterious and poisonous and noxious chemical and other matters, and had diverted the beds or channels of the streams within their own premises.

The bill alleged that, previous to such pollutions and diversions, the said streams or watercourses were fit for the purposes of irrigation, and for culinary purposes, and for cattle, and were productive of fish; but that since such pollution and diversion the defendants had not only checked and cut off the usual flow of water from the plaintiff, but had rendered the reduced supply unwholesome and unfit for the use of man or beast, and destructive of the fish, to the plaintiff's great and irreparable injury. The bill prayed in the terms of the injunction before stated.

By their answer the defendants stated, that they had in the prosecution of the said business used and employed, and that they still used and employed, some deleterious, poisonous, and noxious chemical and other matters, and that the elements or chemical substances used by the defendants in the various processes of bleaching or contained in the refuse left thereby, were soda, carbonic acid, lime, sulphuric acid, chlorine, and vegetable matter; that such elements were contained in various degrees in the matters used by the defendants in the process of bleaching, but that the poisonous and deleterious qualities of such elements were in the said process extracted to the utmost possible extent; that occasionally the waters of the said stream were rendered very foul and corrupt by pumping out the sump holes of certain collieries, and by the existence of a fellmonger's yard, and by the sewerage of a village, all higher up the stream. The defendants then admitted the diversion of the stream within their own premises, but contended that such diversion did not in any way affect the quantity of water supplied to the plaintiff's lands. They then stated that, notwithstanding the use as therein mentioned of certain deleterious and poisonous chemical elements in the process of bleaching, all the deleterious, noxious, and poisonous qualities thereof were to the utmost possible extent eradicated, neutralized, used, and absorbed in such bleaching process; that in order to render it impossible that the said streams or either of them should be in any way prejudicially affected by the said bleaching operations, the water employed for bleaching purposes was made to pass through

several filters before the same was returned to the brook, so that at the time the water was so returned the same was almost entirely free from any impregnation whatever of the ingredients employed in bleaching, and was, although sometimes to a very trifling degree discolored, perfectly innocuous and fit for the drink of animals and unprejudicial to the lives of fish; that the water was, when it reached the lands of the plaintiff, in all respects as pure and wholesome and capable of being applied to culinary or any other purposes as before the erection of the said bleaching works, and was as pure and wholesome as if the same had not been at all employed by the defendants in the said bleaching purposes. They denied that the bleaching works tended or would tend to the injury or nuisance of the plaintiff or his property.

There was no precise evidence of the time when the bleaching operations of the defendants commenced, except that it appeared by the bill that it was some time in 1848.

Mr. Stuart and *Mr. T. H. Terrell*, for the defendants, in support of the motion. The Vice-Chancellor has construed this answer as admitting the acts complained of to be a nuisance, and therefore the plaintiff's title to the injunction, but the answer is in this respect only a qualified admission, for although it admits the diversion of the streams, yet it states that such diversion has taken place in the defendants' own premises, and that the streams are restored to their ancient channels before they reach the plaintiff's lands; and again, although it admits the use of deleterious matters for the purposes of bleaching, yet it states that by filtration the noxious qualities of the substances used are to the utmost possible extent extracted. This is at most only a private injury, the amount of damage from which is a question for a jury to determine. It is clearly not a nuisance warranting the interference of this court by injunction.¹ Lord Redesdale lays it down,² that "in the case of a private nuisance it seems necessary that a judgment at law ascertaining the rights of the parties should have previously been obtained" before a court of equity will interfere. These works have been in operation for more than a year, so that there was ample time to have brought an action.³

Mr. Bethell, *Mr. Rolt*, and *Mr. Rogers*, *contra*. The answer does not question the plaintiff's title: there is therefore nothing to be tried by a jury. It is not so much a case of nuisance as of irreparable waste, and the admissions in the answer on which we rely are quite sufficient to sustain this injunction. It is no answer to such a case as

¹ *The Attorney-General v. Cleaver*, 18 Ves. 211. ² *Mit. Pl.*, p. 144, ed. 4.

³ They also referred to *Spottiswoode v. Clarke*, 2 Phil. 154.

the bill makes, to be told that the poisonous matter admitted to be used is "extracted to the utmost possible extent."¹

Without calling for a reply, the LORD CHANCELLOR, after remarking that there was no evidence of there being any house on the plaintiff's lands, so that nothing prejudicial to culinary purposes was to be apprehended, observed that the injunction not only interfered with what was alleged to be a nuisance, but also with the diversion of the streams in the defendants' own lands. His Lordship then proceeded to the following effect:

The diversion complained of is a grievance unconnected with the pollution of the water, and the stream being restored to its old channel before it enters on the plaintiff's lands, the diversion cannot interfere with any right that the plaintiff may have to the water. How far then is there a case made out for the interposition of the court? The Vice-Chancellor has proceeded on admissions in the defendants' answer, which is not perhaps as guarded as it might have been. The bill alleges a right to certain water in as pure a state as it was accustomed to flow before these bleaching works were erected; and the answer admits this right, subject to certain qualifications annexed to the admission. The Vice-Chancellor has, however, construed this into an unqualified admission that the plaintiff is entitled to the use of the water in the manner alleged by the bill.

Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages. In the manufacturing districts, where there are as many mills along a stream as the water will supply, it would be extremely hard that a proprietor of one of such mills might not divert the stream within his own land, restoring it to its ancient channel before it entered into the lands of his neighbor without a diminution of the usual quantity. In such cases, and in the similar case of alleged obstruction to the use of light, in order to sustain an injunction, there must be both an unwarrantable use and an injury resulting from such use. In the present instance, however, the defendants' admission is quite consistent with the fact that the plaintiff has sustained no injury; and this court will not take upon itself to adjudicate upon the question of whether this is a nuisance or not: that must be ascertained in a court of law, as laid down by Lord Eldon in *The Attorney-General v. Cleaver*.²

Another consideration here is which side will suffer most, the

¹ They referred to *Wood v. Waud* (before the Court of Exchequer, April 28, 1849), as to the rights of a riparian proprietor to a natural stream.

² 18 Ves. 211.

defendants from the granting of the injunction, or the plaintiff from its being withheld. The injunction effectually prevents the defendants from working at all, for if they could go on without diverting the stream, they would be subject to a breach of the injunction by employing for their bleaching the chemical process which they have hitherto used, and in the event of their being able to employ other ingredients, they would still be prevented from diverting the stream. With respect to the stream being polluted and poisoned, it is admitted that the plaintiff has no house on these premises, so that there can be no interruption to any culinary operations, as is to be inferred from the statements in the bill. Then it is alleged that the water is not so good for the purposes of irrigation; but many of the ingredients used by the defendants in their bleaching process are in fact most beneficial to land; and there is no statement that the water is injurious to cattle, or that the fields are not equally well drained. There can be no doubt, then, as to the balance of inconvenience. If this injunction stands there will be a total cessation of the defendants' works, which would amount to the greatest injury, and, therefore, on this ground alone, I must refer the case to a jury, and have the legal right first ascertained.

The real contest between the parties is, whether the plaintiff's land is injuriously affected by what the defendants have done. The answer, so far from admitting such a conclusion, leaves it very doubtful, in my opinion, whether any injury at all has resulted to the plaintiff from the defendants' works. To this consideration must be coupled the admitted fact, that there have been two assizes since the works complained of were commenced where the plaintiff might have established his right; and where a party cannot show that he is necessarily compelled to come into a court of equity, he is not entitled to call on the court to go out of its usual course on his behalf. For all these reasons I am of opinion that the injunction must be dissolved.

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SOLTAU *v.* DE HELD.

IN CHANCERY, BEFORE LORD CRANWORTH, V. C., DECEMBER 9, 10,
11, AND 23, 1851.

[*Reported in 2 Simons, New Series, 133.*]

PREVIOUSLY to 1817, a mansion-house in Park Road, Clapham, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March, 1817, the plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had, ever since, resided in it with

his family. The other messuage was occupied as a private residence up to July, 1848, when it was purchased by a religious order of Roman Catholics, called "The Redemptorist Fathers"; and they converted the ground-floor into a chapel, and appointed the defendant, who was a priest of the Roman Catholic Church, to officiate in it. In August, 1848, the defendant caused a wooden frame to be erected on the roof of the last-mentioned messuage, and a bell to be hung in it, which was rung, by his direction, five times on Monday, Tuesday, Wednesday, Thursday, and Friday; six times on Saturday, and oftener on Sunday, in every week: the ringing ordinarily commenced at five in the morning, and continued for ten minutes, to the great discomfort and annoyance of the plaintiff and his family. On the 12th of October, 1848, the plaintiff sent the following letter to the Superiors of the establishment: "Sir or Sirs: As well on the part of myself and neighbors, *as the parish generally*, I have to complain of the great annoyance of the bell you have caused to be erected on the roof of your house, and which is loudly tolled as early as five o'clock, and very frequently afterwards, during the morning, afternoon, and evening: we hope, on your receiving this representation, you will take immediate measures to abate this great nuisance, and thereby relieve me and my neighbors *and the rest of the inhabitants of this parish*, from any further disturbance." No answer was returned to that letter; and the ringing being continued, to the great annoyance of the plaintiff and his neighbors, they, on the 21st December, 1848 (before which time the messuage had been duly certified and registered as a place of religious worship for Roman Catholics),¹ signed the following notice and served it upon Cardinal Wiseman, who exercised ecclesiastical jurisdiction over the defendant as the priest of the chapel: "To the Superiors, Directors, Managers, and Occupiers of the Roman Catholic house and establishment at Park Road, Clapham, and to all others whom it may concern: we, the undersigned occupiers of dwelling-houses in the vicinity of the house and establishment above mentioned, desire to represent that we are subjected to a great inconvenience and annoyance from the loud and frequent ringing (often at unseasonable hours) of the large and harsh-sounding bell some time since erected upon an open frame on the roof of the said house. The practice we complain of, is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when members of our household happen to be invalids: it tends also to depreciate the value of our dwelling-houses. Under these circumstances, we trust you will immediately take the present complaint into your serious consideration, and voluntarily redress the grievance, instead of con-

¹ See 31 Geo. III., c. 32, and 2 & 3 Will. IV., c. 115.

straining us to have recourse to the law, to abate what we all, from experience, deem a very grave, indeed intolerable nuisance." A copy of that notice was served on Mr. Harting, the solicitor of the Cardinal and defendant: and, on the 1st of February, 1849, the plaintiff's solicitor had an interview with Mr. Harting, who stated that he had seen the Cardinal and some other persons, on the subject of the notice; and added that the bell was never rung for any but public purposes; namely, purposes interesting to the Catholic population, and not for any household purposes; and that, in deference to the wishes intimated in the plaintiff's letter of 12th October, 1848, the hour of the early bell had been altered from five to six o'clock, and that, willingly, if they could, they would meet the desires of their neighbors still further; but *that* they could not do.

In May, 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that month, and, on that occasion, six bells, which had been placed in the belfry of the steeple, were rung nearly the whole day. The chapel bell was rung at five o'clock and a quarter before seven every morning: the steeple bell,¹ at a quarter to nine every morning, and a quarter before and a quarter past seven every evening. On 13th May, 1851, a peal of six bells was rung several times: on the 14th, the peal continued, at intervals, during the whole day: on Sunday, the 18th, the chapel bell rang at five o'clock, the steeple bell at a quarter to seven, and again at a quarter to nine. The chapel bell again rang at half-past ten. A peal of chimes was rung at eleven, and, again, at a quarter before one; again at a quarter before six, and again at a quarter before eight. On Saturday, the 24th May, the chapel bell rang, as usual, the three times above mentioned, and the steeple bell twice, and, in addition, a peal of the six bells was rung from half-past eight till a quarter to ten at night. On Sunday, the 25th May, the chapel bell was rung at two different times, and the steeple bell seven different times. On Monday evening, the 2d June, a peal of the bells was rung; and, on Saturday the 7th, a peal was rung from a quarter to eight to a quarter to nine. On Saturday, the 8th of June, in addition to the ordinary bells, the chimes were rung several times up to nearly nine in the evening. The chapel bell and church bells were, subsequently to 20th of May, rung, daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November, 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the plaintiff, or the mem-

¹ *Sic.*

bers of his family, to read, write, or converse in his house : that the ringing of the chapel bell and church bells was an intolerable nuisance to the plaintiff, and, if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the plaintiff to reside, any longer, in his house : that, in consequence of the before-mentioned grievance, the plaintiff applied to the defendant, to desist from ringing the said bells or any of them, so as to occasion any annoyance to the plaintiff ; and, the defendant having refused to comply with that application, the plaintiff, in June, 1851, commenced an action against the defendant to recover damages for the nuisance committed, to him, by means or in consequence of the before-mentioned ringing of the said bell or bells : that the action was tried on the 13th August, 1851, when a verdict was found for the plaintiff, with forty shillings damages and costs : that, on the 10th November, 1851, judgment in the action was signed, and it remained unreversed.

The bill further alleged that, some time after the commencement of the said action, the chapel bell was removed, from the roof, to one of the sides of the chapel, and, after the 13th August, neither that bell nor the church bells were rung until Sunday the 9th November, 1851 ; when the defendant caused the church bells to be rung as follows : that is to say, one bell at a quarter before nine in the morning, for five minutes : one bell at twenty minutes past ten, for the like time : three bells at a quarter before eleven, for the like time : one bell at half-past six in the evening, for five minutes, and three bells at ten minutes to seven, for five minutes ; and, on Sunday the 16th November, 1851, the defendant caused the said bells to be rung in the same manner and for the same times ; and he threatened and intended not only to continue ringing the last-mentioned bells every Sunday in manner last aforesaid ; *but also to ring peals of the said six bells, and to ring on week days, and also to ring the chapel bell* ; and that the weights and sizes of the said six bells were as follows :

	cwt.	qrs.	lbs.	Size in diameter. feet. in.
The 6th bell	9	0	20	3 3
5th "	7	3	7	2 11
4th "	6	1	3	2 9
3d "	6	0	20	2 7
2d "	4	3	9	2 4
1st "	4	1	11	2 3
	<hr/> <u>38</u>	<hr/> <u>2</u>	<hr/> <u>14</u>	

The bill further alleged that the tolling and ringing of the church bells on the 9th and 16th November, 1851, caused considerable annoyance

to plaintiff and his family, and, when some of the more weighty of the bells were rung, it was impossible for the plaintiff to read or converse without great difficulty : That, one of the plaintiff's daughters being in a delicate state of health, the plaintiff, during the period that the defendant caused the church bells to be rung previously to the commencement of the action, was obliged to remove her to some more quiet place of residence ; and, since the verdict and before the commencement of the ringing on the 9th November, the plaintiff had caused his daughter to be brought back to his house ; but, if the ringing was continued, he should be obliged again to remove her : That the ringing on the 9th and 16th November, 1851, was and constituted a nuisance to the plaintiff; and, if it was continued, the value of his house would be considerably diminished ; and, if he should be obliged to leave it in consequence of the continuance of the ringing, he should have great difficulty in disposing of it, or would only be able to dispose of it at a considerable pecuniary sacrifice : That, if it were necessary, for the purposes of the performance of the ceremonies practiced by persons professing the Roman Catholic religion, that their chapels and churches should have a bell for the purpose of its being rung occasionally ; yet the ringing of peals of bells, or the ringing of bells or a bell for any purpose, religious or otherwise, ought not to be permitted if it occasioned a nuisance or annoyance to any person or persons residing in the neighborhood ; and that the plaintiff's bedroom was not more than twenty yards distant from the chapel bell and the church bells.

The bill prayed that the defendant and all persons acting under his directions or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung : or that the defendant and such persons as aforesaid, might, in like manner, be restrained from tolling or ringing the said bell or bells, or permitting the same or any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing at his residence in Park Road, Clapham.

On the day after the bill was filed, the plaintiff served the defendant with notice of a motion that the defendant and all persons acting under his directions or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells or any of them, or permitting them or any of them to be tolled or rung.

The defendants put in a general demurrer to the bill, which now came on to be argued.

Mr. Campbell and *Mr. Bagshawe* in support of the demurrer.

Mr. Malins and *Mr. Tripp* in support of the bill.

The VICE-CHANCELLOR said that he was of opinion that the demurrer

could not be sustained ; but that he should not then state his reasons, lest he should prejudice the argument on the motion, and that, when he had heard the motion, he would give his reasons for overruling the demurrer.

Mr. Malins and *Mr. Tripp* then made the motion.

Mr. Campbell and *Mr. Bagshawe* opposed it.

The VICE-CHANCELLOR. This case came before me, in the first instance, by way of demurrer ; and, the demurrer having been overruled, a motion for an injunction was made. I abstained from expressing, at the time, my reasons for overruling the demurrer, from an apprehension that I might intimate some opinion or drop some expression that might prejudice the argument on the motion. I shall now state my reasons for overruling the demurrer, and then I shall give my opinion on the motion.

The demurrer is a general demurrer for want of equity ; and, of course, by that demurrer, the defendant undertakes to show that, upon the statements contained in the bill, the plaintiff would not be entitled to any relief at the hearing of the cause.

The statements of the bill are as follows, etc., etc., etc.

The first ground of demurrer to this bill is, that the nuisance complained of is a public nuisance ; and, therefore, the suit should have been instituted by the Attorney-General ; and that it is not competent to the plaintiff to file a bill respecting it.

With regard to that ground of demurrer, my opinion is that it is extremely questionable (to say the least) whether this is a public nuisance at all. But, in the view which I take of the case, it is scarcely, if at all, necessary to consider whether it be or be not a public nuisance. I entertain, however, very great doubt whether it be a public nuisance. I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to some, than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it ; but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, perhaps the most ordinary case of a public nuisance, the stopping of the king's highway : that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nui-

sance to a person who has to travel it every day of his life, than it is to a person who has to travel it only once a year, or once in five years: but it is more or less a nuisance to every one who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance. The case before me is a case in point. A peal of bells may be, and no doubt is an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but, to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure; for I cannot assent to the proposition of the plaintiff's counsel that, in all circumstances and under all conditions, the sound of bells must be a nuisance. And it is rather curious that one of the witnesses who was examined on the trial on the part of the plaintiff, and who deposed, strongly, to the bells being an intolerable nuisance when he was in Mr. Soltau's house, says: "But, where I live at Clapham, which is about a furlong from the bells and with the intervention of trees, so far from their being a nuisance to me, they are a positive gratification; and I confess I should be extremely sorry if they were done away with." I mention *that* only by way of illustrating that, in this case, to some persons who live within the sound of these bells, they may be no nuisance at all; and, no doubt, are none; and, therefore, I very much doubt, indeed, my opinion is that the nuisance complained of in this case could not be indicted as a public nuisance.

But, as I have said, it is of very little moment in the view I take of this case, whether the thing complained of be or be not a public nuisance. I may further make this observation, that it does not follow, because a thing complained of is a nuisance to several individuals, that, therefore, it is a public nuisance. One may illustrate that, very simply, by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen different dwelling-houses. It does not follow that, because half a dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one act, that, therefore, it is a public nuisance which can be indicted at the suit of the Crown, or for which the Attorney-General can file an information in this court. It is a private nuisance to each of the several individuals aggrieved. However, in my further observations on this ground of demurrer, I will proceed on the assumption that it is a public nuisance; that is to say, that the defendant is right in his contention that it is a public nuisance, and let us see what the consequence will be if it be so.

Now, in the case of a public nuisance, the remedy at Law, is indictment ; the remedy in Equity, is information at the suit of the Attorney-General. In the case of private nuisance, the remedy at Law, is action ; the remedy in Equity, is bill. And this is the distinction which is pointed out in those passages cited, by Mr. Campbell, from the 3d vol. of Blackstone's Commentaries and from Mitford's Treatise on Pleading. But it is clear that that which is a public nuisance, may be also a private nuisance to a particular individual, by inflicting on him some special or particular damage : and, if it be both, that is, if it be, in its nature, a public nuisance, and, at the same time, does inflict, on a particular individual, a special and particular damage, may not that individual have his private remedy at Law, by action, or, in Equity, by bill ? That is the question which is to be determined with respect to this ground of demurrer. The defendant's counsel insist that he cannot ; and several cases were cited in support of that proposition. But, on referring to those cases, it appears to me that they do not support that proposition.

In *Iveson v. Moore*, the case which was first cited and which is a very important one, the Judges of the King's Bench were divided in opinion : but the counsel who cited that case considered that they had the authority of Lord Holt (a very high authority), for the proposition that an individual could not maintain an action at law for the damage to himself, where the subject of the action, was a public nuisance. Now, on examining the case, so far from supporting that proposition, it proves directly the contrary. I think it right to refer to the details of that case, rather particularly. It is reported not only in *Comyn*, but much more fully in the first vol. of Lord Raymond's Reports.¹ There the plaintiff and defendant were the owners of two adjoining collieries, and the action was an action on the case, and the declaration alleged that the plaintiff had dug, from his own colliery, a considerable quantity of coals which he had for sale ; and that the defendant, in order to alienate and seduce customers and buyers from the plaintiff's colliery and to appropriate those customers and procure them to go to his own colliery, stopped up a certain place in, through and over which the highway led ; and that it continued so stopped up for a month ; so that the carts for conveying the plaintiff's coals could not pass that way. Now, so far, that was a public nuisance. But then the declaration went on, and alleged the special damage *per quod* the plaintiff, during all that time, lost the benefit and profit of his colliery ; and his coals dug out of his said colliery : "*magnopere deteriorati et depretiati devenerunt pro defectu emptorum, ex causâ predictâ, sic impeditorum et obstructorum.*" That was the way in which he laid the special damage to himself. The jury found a verdict for the plaintiff ; and it was moved, in arrest of judgment, that

¹ *Com.* 58 ; *1 Ld. Raym.* 486.

the action could not be sustained; and a rule was obtained to show cause why the judgment should not be entered for the defendant instead of the plaintiff. The Judges of the Court of King's Bench were equally divided in opinion as to whether judgment ought to be for the plaintiff or for the defendant. Gould and Turton thought that judgment should be for the plaintiff. Rokeby and Holt were of the contrary opinion, and thought judgment should be for the defendant. But why? Not because either of them entertained the least doubt as to whether an individual could (although it was a public nuisance) maintain an action for a special damage to himself; but because they considered that the special damage was not laid, in the declaration, with sufficient accuracy and minuteness; and only on that ground. Rokeby, who coincided with Holt, expressed himself distinctly, and begins his judgment with the very proposition which is against the contention of the plaintiff. He said that he would admit that no particular person could have an action for the general stopping of a way; first, because the offender is punishable at the King's suit; secondly, because multiplicity of actions is to be avoided; and if one man may have an action, for the same reason, one hundred thousand may. But: "*If the stopping be a particular damage to a particular person, he may have an action:* but then the particular and special damage must be particularly and certainly alleged; which is wanting in this action, and therefore it does not lie." So Holt, in the same way, gives his reasons at great length. He considers, first, the question whether an action would lie for the mere stopping the way, on the ground that the plaintiff's coal mine was situate near to the highway. He says no; it is a public nuisance. Secondly, he considers whether there ought not to be, further, some special damage to support the action, and whether this damage is specially enough shown. So it is clear that both he and Rokeby concurred, with the other Judges, in opinion that the action would lie, provided the *per quod* in the declaration laid the special damage with sufficient accuracy and particularity. But, when I look at Holt's own report of the case,¹ it is put beyond all question: he concludes by mentioning this as the result of the whole case. He says: "In this case it was agreed, by the whole court, that, where an action arises from a public nuisance, there must be a special damage; for he that did the nuisance is punishable, at the suit of the public, by indictment or information; and, to allow all private persons their actions without special damage, would create an infinite multiplicity of suits." And, further than this, it appears, by the note which is appended to the report in Lord Raymond, that the case was re-argued before the four Judges of the Common Pleas and the four Barons of the Exchequer, and that the eight were unanimously of opinion that the action lay, and that the special

¹ Holt's Rep. 16.

damage was sufficiently laid, and that judgment should be for the plaintiff. That case appears to be one of no slight importance. It was the opinion of all the twelve Judges at that time, with Lord Holt at their head, that, in a case beyond all question a case of public nuisance, a particular individual may have an action for a damage sustained, provided he lays that damage with sufficient particularity in his declaration, and of course proves it by sufficient evidence. Therefore, that case, so far from establishing the proposition contended for by the defendant, establishes the direct contrary.

Another case cited was *Baines v. Baker*, reported by Ambler and also by Atkyns. It was a bill to restrain the erection of the Small-pox Hospital in Cold Bath Fields. Both the reports are jejune ; and, unfortunately, there is no trace of the facts of the case in the Registrar's book. It appears, as far as one can collect from the reports of the case, which are very unsatisfactory, that the intended erection of the Small-pox Hospital spread dismay and terror through the neighborhood ; and that the plaintiff was the owner of some houses in Cold Bath Fields, and that his tenants (it does not appear that he himself resided there) were giving him notice to quit their houses. That was the only way in which any special damage was alleged at all, as far as I can collect. But the Lord Chancellor, Lord Hardwicke, decided that the hospital was not a private nuisance ; and doubted whether it was a public nuisance ; and he refused the injunction. But I cannot collect that he expressed any opinion that, if it had been a public nuisance and special damage arose to the plaintiff from it, the plaintiff might not come into a Court of Equity to restrain that nuisance.

Another case cited, was the case of the Attorney-General *v.* The Foundling Hospital ; but it has nothing to do with either public nuisance or private nuisance. It was only the case of an information filed by the Attorney-General on behalf of the charity, the Foundling Hospital, to restrain the persons who had the management of that hospital from dealing with the charity property, by building upon it in a way that was alleged to be a breach of trust and a mismanagement of the property. It was not a case of nuisance at all.

The Fishmongers' Company *v.* The East India Company shows only that the Fishmongers' Company could maintain a bill for an injunction to restrain the defendants, the East India Company, another corporation, from building a wall so as to darken their ancient lights ; but the injunction was refused, because the distance of the wall complained of from the plaintiffs' lights was so great that it was considered not to amount to a nuisance.

The Attorney-General *v. Nichol* was a suit on behalf of a charity ; and, on that account, and not on the ground of public nuisance, an information was filed by the Attorney-General.

In *Crowder v. Tinkler* the bill was filed, by a private individual, to restrain the erection of a corning-mill, for the manufacture of gunpowder, near to his premises, on the ground that it would endanger the safety of his property : and the Lord Chancellor directed the plaintiff to indict the building as a nuisance, that is, as a public nuisance ; and, in the meantime, he put the defendant on terms as to how he should use the mill, with liberty to apply on the result of the trial. That case is against the proposition contended for by the defendant ; because there the nuisance was a public nuisance ; yet Lord Eldon sustained the bill.

Hudson v. Maddison was the case of five persons joining together to complain of an act which was a separate nuisance to each of them : and all that was decided in that case was that the five could not sue together.

Squire v. Campbell was the case of the erection of the statue of George the Third near Pall Mall East ; and the Attorney-General was made a defendant to the suit, not in respect of nuisance, but because the freehold of the ground on which the statue was erected was in the Crown.

The Attorney-General *v. Cleaver* was the case of a public nuisance ; and there an information was filed by the Attorney-General. But that proves nothing. It only shows that, where the object is to restrain a public nuisance, an information must be filed. It does not at all show that an individual may not file a bill, if he can show special damage arising to himself out of a public nuisance. These are the cases cited in support of the proposition that the bill will not lie.

Several cases have been referred to on the part of the plaintiff; such as *Spencer v. The London and Birmingham Railway Company*, *Sampson v. Smith*, *Haines v. Taylor*, and *Walter v. Selfe*, in all of which it was held that, if an individual sustains a special and particular damage from an act, he may have the interference of the court on a bill, although the act complained of be, in its nature, a public nuisance. Two other cases were cited : *The Attorney-General v. Forbes*, and *the Attorney-General v. Johnson*. Those cases show only that there may be both an information and bill ; that is, that the Attorney-General may file an information to restrain the act complained of as a public nuisance, and that an individual who sustains a particular injury may join as plaintiff as well as relator, and have the remedy for himself also in the same suit. I am of opinion, therefore, that the first ground of demurrer is not tenable.

The next ground insisted upon in support of the demurrer, was that the plaintiff had not established his right at law. Now, it is true that Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law : there is no such thing as an equitable nuisance : but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction ; but

it is not ground of demurrer, as appears from *Berkley v. Ryder*,¹ and from Lord Cottenham's judgment in *Elmhirst v. Spencer*, where his Lordship expresses himself thus : "The plaintiff, before he can ask for the injunction, must prove that he has sustained such a substantial injury, by the acts of the defendant, as would have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says : "This court will not take upon itself to adjudicate upon the question whether this is a nuisance or not : that must be ascertained in a Court of Law, as laid down by Lord Eldon in *The Attorney-General v. Cleaver*." Now, in *The Attorney-General v. Cleaver*, which was a case of public nuisance, Lord Eldon directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand over until the hearing of it. Therefore, Lord Cottenham, in that case, is referring to this ; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is ground of demurrer because the action has not yet been brought. However, whether that be so or not, the plaintiff in this case has brought his action at law, and obtained a verdict.

Then this ingenious argument was adduced. It was said : "There has been an action at law ; but what is now being done, and which you call a nuisance, has never been tried at law. When the trial took place we were ringing every day in the week : we were beginning at five o'clock in the morning, and we were ringing a considerable period of time on each occasion : but now we ring only on Sundays. We ring a fewer number of times, and do not ring so long at a time. Therefore you must bring your action for this, and try whether this is a nuisance." If that argument were to prevail, see what it would come to. Supposing that, after the trial of the action, the defendant, instead of ringing seven days in the week, had rung six ; or, instead of beginning at five o'clock in the morning, had begun at six ; or, instead of ringing for a quarter of an hour, had rung ten minutes each time ; and, when the plaintiff came into Equity to restrain him, he had said : "You have not tried this. When you brought your action, I rang seven days in the week. I ring only six now. I began at five o'clock : I now begin at six in the morning." If that were yielded to, and another action brought and damages recovered, the defendant would reduce the number of days' ringing from six to five, and say you have not tried this ; and so on *toties quoties*. It is clear the argument, if pushed to its full extent, must result in that which is contrary to all reason and to all justice. The questions to be tried were, whether the plaintiff's right in his house was such as to entitle him to come for relief at all, and whether the ringing of the bells was in its

¹ 2 Vesey, sen., p. 533.

nature, a nuisance at law. Both those questions have been tried ; but the exact extent or *quantum* of injury or nuisance inflicted, need not be ascertained. Besides, the whole argument upon this ground is put an end to by an allegation in the bill, which the demurrer, of course, admits to be true ; "that the defendant threatens and intends, not only to continue tolling or ringing the last-mentioned bells every Sunday in the manner last aforesaid ; but he also threatens and intends to ring peals of the said six bells, and also to toll and ring, on week days ; and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house." Therefore, upon this demurrer, it is quite clear that the argument that the plaintiff has not established his right at law, cannot be maintained.

There was one point raised by the plaintiff which I do not think it necessary to go into. The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their place of worship. It appears to me that whether that be so or not, is perfectly immaterial to this case ; because, if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering. Therefore, I do not at all go into the question, whether, under the numerous Acts of Parliament relating to Roman Catholics, it be or be not now lawful to have a steeple and bells. For the reasons which I have mentioned, I overrule the demurrer.

I now proceed to give my opinion with regard to the motion. And many of the observations which I have made upon the demurrer, necessarily apply, more or less, to the motion : for I find that the facts alleged by the bill are verified by affidavit. I have already stated those facts, and, therefore, I need not repeat them. But I must observe that the six bells in the steeple of the church, are not, in respect of size, such as are used in most chapels and district churches in and near London : but they are unusually large bells ; and the effect produced by ringing them is thus described by Mr. Soltau in his affidavit : He says, "That, when a peal of the bells of the said Roman Catholic church was rung, the noise was so great that it was impossible for me or the members of my family, to read, write, or converse in my dwelling-house : And I further say that the tolling and ringing of the said bell and bells, was and is an intolerable nuisance to me ; and, if the said bell or bells is or are permitted to be tolled or rung in the manner in which the same was so tolled and rung as aforesaid, it will be impossible for me to continue to reside, any longer, in my said house." That is the description of the effect produced by the ringing of the bells as it was practiced antecedently to the trial in August last. It appears that the chapel bell has been since removed

from the top of the building to the side furthest from the plaintiff's house. The affidavit then describes the effect of the ringing which took place on the 9th and 16th November last, that is, as it is now practiced: "And I further say that the tolling and ringing of the said bells of the said Roman Catholic church in the manner in which they were so tolled and rung on the said 9th day of November instant and 16th day of November instant, caused considerable annoyance to myself, and disturbed the devotions of the members of my family; and that, during the time or times when some of the more weighty of the said bells are rung or tolled, it is impossible for me to read or converse without great difficulty." Then he mentions the fact of his daughter having been removed from the house, which I do not dwell upon, and he proceeds thus: "And I further say that the tolling and ringing of the said bells on the said 9th and 16th days of November, 1851, was a great annoyance and nuisance to me and my family; and I further say that, if the said bells of the said church are permitted to be tolled and rung in the manner in which they were so tolled and rung on the 9th and 16th days of November as aforesaid, the value of my said dwelling-house and premises will be considerably diminished, and that if I and my family are compelled to leave, I could only dispose of it at a great pecuniary sacrifice; and I further say that the distance of my bedroom from the bell of the said chapel and the bells of the said church, does not exceed twenty yards." There is another affidavit, that of Mr. Gadsden, in support of the plaintiff's case, which thus states the nuisance as it exists according to the present practice of ringing: "I further say that I have heard the said bells, as they now ring and toll since the 13th August, when I was in the plaintiff's residence, on the 30th November now last past"; that 30th November being a Sunday; "and I consider the ringing and tolling of the said bells, both as they were rung and tolled, prior to the 13th day of August, 1851, and as they are now rung and tolled, to be peculiarly annoying and distressing to any person occupying the said residence of the said plaintiff; and, in my opinion, the value thereof is greatly decreased by reason of such ringing and tolling." Then he goes on to state: "That, if the said bells were not rung and tolled as aforesaid, in my opinion, the said house would still let for £130 per annum, the rent which I am informed the said plaintiff now pays for it; and I say that I consider, from the peculiar position of the said church with reference to the plaintiff's residence, that any ringing or tolling the bells of the said church, even on a Sunday only, as they are now rung and tolled, would have the effect of deteriorating the value thereof; because I do not believe any private gentleman or lady or person who could afford to pay such a rent, would become a tenant thereof." That is the account given of the effect of the present nuisance. Now it struck me, at the time when the motion was

made, that more persons ought to have been brought forward to depose to the fact of the nuisance. But, when I consider that, in fact, there is no controversy about it, and that there is no contradictory evidence, I think that the plaintiff was perfectly justified in not producing any further evidence than his own affidavit and the affidavit of one disinterested person. It is not, however, quite correct to say that there is no controversy about the nuisance; for there is an affidavit on the part of the defendant, made by Mr. Wright, a builder and house agent at Clapham, who says: "I live near the church in the pleadings mentioned and within full hearing of the bells in the pleadings also mentioned; and I say that I do not consider them any nuisance; and I say that I know, from frequent communication with my neighbors, that the said bells are not considered a nuisance to persons generally." And then he adds this: "and I say that the four Protestant churches in Clapham, have and use bells which ring several times, for half an hour at a time, on Sundays, and twice on Wednesdays and Fridays, besides frequent ringings, during the day, for deaths and funerals." That is the only affidavit which at all contradicts the fact of this being a nuisance: but what does it amount to? This gentleman says: "I live near the church." The question is how near? He says: "I live within full hearing of the bells"; yes, but how near to the bells? He says that his neighbors do not consider them a nuisance. But where do those neighbors live? How near to the bells? It really comes round to what I observed upon the demurrer, that the ringing of these bells, is a great nuisance to a person living as near as the plaintiff does, but is not only no nuisance, but may be a cause of pleasurable sensations to those who live further off: and, as Mr. Wright has not thought fit to tell me how near he lives to the church, I am left to conjecture: it may be 50 yards, 100 yards, 500 yards, or 1,000 yards; and although he may live sufficiently near to the church to hear the bells, yet he may hear them in a way which may be gratifying, or, at all events not annoying. So, also, with respect to the neighbors: we have no means of knowing who those neighbors are, or how near they live. All that we are told is that they do not consider the ringing a nuisance. Therefore I consider the fact of its being a nuisance, sufficiently established by the affidavits which have been made by and on the part of the plaintiff. Moreover one ought to take into consideration the actual circumstances proved and not at all disputed, namely, that these bells are of a most unusual weight, and size; that they are placed in a steeple which is almost in front of the plaintiff's house; and in a place which was the court-yard of the mansion-house, before it was divided into two houses. When you consider those circumstances, it is hardly necessary to produce affidavits to show that it must be an intolerable nuisance to have such large bells ringing, though for a short period of time and only on Sundays, so near

to the plaintiff's house : and it is to be remembered that the plaintiff has not gone to the bells, but the bells have come to him. Then I may further observe, in connection with this point, that the plaintiff swears that he is informed and believes that the defendant threatens and intends not only to continue tolling or ringing the last-mentioned bells every Sunday, in manner last aforesaid, but also to ring peals of the said six bells ; and also to toll and ring on week days, and also to toll and ring the bell of the chapel : and there is no contradiction to that ; and therefore I must take it that there is the intention, or, at all events, the reservation of the right, on the part of the defendant, to ring as much as he pleases.

Then it is said that part of what is alleged, by the plaintiff, as the mischief arising to him, is the diminution in value of his house ; and it is said, and with perfect truth, by the defendant's counsel, that diminution in value does not constitute nuisance, and is no ground for the court's interfering. But, although it is perfectly true that mere diminution of value does not, *per se*, constitute nuisance, yet, surely the extent of the nuisance, if it be a nuisance, may be materially shown by this ; that so great is the nuisance that no person who can afford to live in such a house as the plaintiff's, would take it with such a nuisance ; and the only person who could be expected to take it, would be one who would pay only a very small rent, and to whom it was a great object to have a very large house at a very small rent, and who would bear with the nuisance for the sake of the small rent which he paid. I say, in that way, the diminution of value is of very great moment, not as constituting a nuisance, but as an *indictium* of the extent of the nuisance.

Under those circumstances the question that I have to determine is a question which I cannot do better than state in the language of Vice-Chancellor Knight Bruce, when he decided the case of *Walter v. Selfe*. He says : "The important point next for decision may properly, I conceive, be thus put : Ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness ; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living ; but according to plain, sober and simple notions among the English people ?" That, I think, enunciates distinctly the question which is to be tried upon such an occasion as this ; and I must add, in the very words of Vice-Chancellor Knight Bruce, that I am of opinion that this point is against the defendant ; that this is such an inconvenience, and such an invasion of the domestic comfort and enjoyment of a man's home, that he is entitled to come and ask this court to interfere. And, upon that point, I will just refer to the language of Lord Eldon, in the case of *The Attorney-General v. Nichol*. He says :

"The foundation of this jurisdiction" (that is, interfering by injunction) "is that head of mischief alluded to by Lord Hardwicke; that sort of material injury to the comfort of the existence of those who dwell in a neighboring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law." That is the ground for interference by injunction, and that is the ground upon which, I conceive, that I ought to grant an injunction in this case.

Before I conclude I will just make an observation upon a point which was raised by the defendant's counsel: namely, that these bells are no more a nuisance than the bells of a parish church are. It is said that, in this parish, there are four parochial district churches or parish churches; they have all their bells; they ring on Sundays; and they ring on Wednesdays and Fridays; and, if this be a nuisance, why is not that a nuisance, or, if that be not a nuisance, why is this a nuisance? Now it seems to be overlooked that the building to which these bells are attached, although called a church by those who have erected it and those who use it, is not a church in the eye of the law. It is no more a church than the chapel or meeting-house of any denomination of Protestant Dissenters is. A church, in law, is that building of which there is but one in the parish, or but one in the parochial district, where the parish has been divided by Act of Parliament. It is a building the freehold of which and of the yard attached to it, is vested in the parson of the parish; and of which there are churchwardens; to which bells are an appendage recognized by law; the special property in which bells, is, by law, vested in the churchwardens, but for the benefit of the parishioners at large, and, in respect of which bells, it has been held that an action of trover will lie by a succeeding churchwarden, in his official capacity, against the retiring churchwarden, to recover the value of the bells, on the ground of the special property vested by law in the churchwardens; and in which action the property must be laid as being the property of the parishioners. The law recognizes the bells as an appendage to a parish church, and, by law, the churchwardens are to have the custody and care of the belfry in which the bells are suspended and tolled. Moreover, with regard to churches, unless in special cases of churches founded by the Crown, or special cases of churches founded by Act of Parliament, not parish churches, they are under the jurisdiction of the Bishop of the Diocese. There is but one Bishop of the Diocese. Is it said that this building is under the jurisdiction of the Bishop of Winchester, in whose diocese Clapham is situated? Certainly not: it is but a chapel; it is no church; it has no legal privilege of having bells in the same way as a parish church has. I do not mean, in what I say, to intimate, in the slightest degree, that it is unlawful for Roman Catholics to have bells

attached to their places of worship. I avoid that question entirely, as I have hitherto done. But it seems to be assumed that this church stands on the footing of a parish church, and, therefore, that it is as much privileged and entitled to have bells, whether they are a nuisance or not, as a parish church is: and, for that reason I have made these observations.

There has been no acquiescence in this case. The plaintiff has diligently asserted his rights: and I think that he is entitled to an injunction; but not quite in the terms in which it is asked by the notice of motion. The bill asks for an injunction to restrain the ringing of these bells altogether; or, in the alternative, to restrain the ringing of them so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing in his house: and it appears to me that the latter is very nearly the form in which the injunction ought to be granted. Therefore I shall order an injunction to issue to restrain the defendant and all persons acting under his direction or by his authority, from tolling or ringing the bells in the plaintiff's bill mentioned or any of them, so as to occasion any nuisance, disturbance and annoyance to the plaintiff and his family residing in his dwelling-house in the bill mentioned. In thus wording the injunction, I am following what was done, by Vice-Chancellor Knight Bruce, in *Walter v. Selfe*.

I cannot say that it is absolutely impossible that any one of these bells may not be rung so as not to occasion any nuisance or annoyance to the plaintiff. It is possible: and, therefore I do not think it right to say that none of the bells shall be rung again.

ATTORNEY-GENERAL v. THE SHEFFIELD GAS CONSUMERS COMPANY.

IN CHANCERY, BEFORE THE LORDS JUSTICES SIR J. L. KNIGHT BRUCE AND LORD CRANWORTH, AUGUST 6, 1852; BEFORE LORDS JUSTICES SIR J. L. KNIGHT BRUCE AND SIR G. TURNER, JANUARY 12TH, FEBRUARY 1, 1853; BEFORE LORD CRANWORTH, C., AND THE LORDS JUSTICES SIR J. L. KNIGHT BRUCE AND SIR G. TURNER, FEBRUARY 8, 16, 1853.

[Reported in 3 *De Gex, MacNaghten and Gordon* 304.]

THIS was a suit by information and bill, and it now came on upon a motion by way of appeal from the decision of Vice-Chancellor Turner, refusing to grant an injunction which had been applied for by the relators and plaintiffs, the United Gaslight Company at Sheffield, to restrain the defendants from laying down any gas mains, pipes, or works, in or under the streets or highways in the borough of Sheffield, and from breaking up or disturbing for that purpose any road or high-

way, or from doing any other act whereby the passage of her Majesty's subjects along such highways or any of them might be obstructed or rendered less safe or convenient, or whereby the gas mains, pipes, and works of the plaintiffs might be interfered with. The facts of the case as detailed in the Vice-Chancellor's judgment were as follows:

There were formerly two gas companies in Sheffield, each company being incorporated under an Act of Parliament, and each Act of Parliament gives power to break up the pavements, with special provisions for compensation in respect of the damages occasioned by that proceeding. And the Act of the second company provided for the pavements not being broken up except on notice to the first company. There is also a water company in Sheffield, with similar provisions respecting the breaking up of the pavements, and compensation for the damages occasioned by it.

In the year 1844 an Act of Parliament passed, by which the two gas companies in Sheffield were united into one called the United Gas Company, who were the plaintiffs in the present suit.

In addition to the special Acts as to these two gas companies, the general Act of Parliament,¹ applicable to all gas companies obtaining parliamentary powers, contains special provisions as to breaking up the pavements, repairing, and restoring them.

In the autumn of 1851, the defendant's company, the Sheffield Gas Consumers Company, was projected. Soon afterwards a clerk of the plaintiffs, the United Gas Company, took occasion publicly to state that the highway board had no authority to permit the defendants to break up the pavements. The defendants on this published a handbill, in which they insisted that the highway board had such authority. The United Company thereupon, on the 28th of November, 1851, published a counter handbill, stating that the defendants, if they did proceed to break up the pavements, would be liable to indictment, and to the interference of this court by injunction. The defendants, however, went on with their company, and on the 10th of February, 1852, the company was completely registered. The deed of the company was registered on the 13th of March, 1852. On the 22d of March, 1852, the plaintiffs obtained a copy of it. The deed purported to confer powers on the directors of the Sheffield Gas Consumers Company to indemnify the authorities against any indictments, actions, or suits, which might be consequent on the proceedings of the company. On the 6th of April, 1852, the directors of the Gas Consumers Company made a report, by which they stated that they had authority from the parish boards to break up the pavements, and that the surveyors of the highways were favorable to the objects of the company.

¹ 10 & 11 Vict. c. 15.

In this state of circumstances, on the 17th of April, 1852, a bill was filed by the United Gas Company against the Gas Consumers Company, for an injunction similar to the injunction which was asked by the present information and bill. A motion was made for an injunction accordingly before Vice-Chancellor Turner, on the 24th of May, 1852, and was refused.

On the 11th of June, 1852, the plaintiffs gave notice to the surveyors of the highways not to sanction the breaking up of the pavements. There are several boards and surveyors of highways in Sheffield; some of these boards returned answers to the notices, others of them returned no answers. The answers which were returned were not satisfactory. In this state of circumstances, on the 16th of July, 1852, the present information and bill was filed.

The case made by the information and bill was, that the defendants, the Gas Consumers Company, had no legal authority to break up the pavements; that proceedings on their part would be attended with great injury to the highways, from the laying down of the pipes, and from the continually recurring necessity of taking up the pavements for the purpose of remedying any defects which there might be in the mains or pipes which might be laid by the company.

Mr. Rolt and *Mr. Amphlett* in support of the appeal.

Mr. Bethell, *Mr. Daniell*, and *Mr. T. H. Terrell* for the defendants.

THE LORD JUSTICE KNIGHT BRUCE. The case divides itself into two portions, one relating to alleged public right, the other to alleged private right.

To take the latter first: This bill was filed on the 14th of July last. The company whose acts it seeks to prevent was notoriously proposed to be formed in the autumn of last year. It was then notorious that the company so proposed meant to do, if they could, the acts which are sought to be restrained by this motion; but as I have said, the bill was not filed till July. Now, it has been, I think, taken for granted of late more generally than the authorities warrant, that if there be notice of an objection, it is equivalent or nearly equivalent to the institution of a suit, and that whenever a suit is instituted, the time for the purpose of equitable relief ought not to count, for many purposes at least, against the plaintiff, after the time when notice of the objection was given; and it is said that notice of objection to this scheme or undertaking was given as early as the autumn of last year, and has been repeated and continued since. I do not, however, accede to the generality of the proposition. The question must depend very much on the circumstances of each particular case, and instances may well be conceived in which, after notice of an objection or opposition, the delay to institute a suit founded on that may well count against the

plaintiff. It strikes me that the present is one of those cases, more especially as in the spring a bill was filed for the purpose of preventing what was intended. It was filed on the 17th of April, 1852; a motion was made for an injunction accordingly; the motion was opposed, and was refused with costs on the 24th of May. There was no appeal from the order on that motion, and the suit has since been abandoned. The same matter is taken up afresh by the present suit. My opinion is, that upon the question of private right, without entering into any other considerations to which this part of the case may possibly be open, that delay furnishes sufficient ground for refusing the merely interlocutory application before us. What it may be right to do at the hearing is a different point.

The question of public right remains; and though a stronger case of delay is probably required to affect those who assert a public right than where a private right is alone in dispute, yet I cannot agree that delay even in such a case is to be without effect. I think it a circumstance to be attended to. Now, as far as the public right is concerned, there has been no suit whatever, except the present; which was instituted more than half a year after the intention to do these acts had become notorious.

And with regard to the public question, there is another consideration not to be forgotten. I agree that motives are very often immaterial with reference to the manner of disposing of a suit. It has been said by an eminent Judge, that if you were to look into the motives of suitors, courts of justice would not sit above a month in the year, and would have little to do. Of course, there are, in numerous instances, motives for litigation, which, if they could be looked into, would prevent a court of justice from interfering. But generally I agree that it is not the rule so to regard them. Where, however, the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which, or under which, the matter is brought forward. Now, in the present case, though the Attorney-General's name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the court, that might not be material. But we find, as a fact, that the majority of the town council is in favor of what the defendants are proposing to do; and on a question of discretion, it is impossible, with reference to a community of this description, not to look with some degree of attention at what the governing body of the borough think on the subject. It is said that many of the members of the town council are interested in favor of the defendants' undertaking. I dare say that it is so; still they are mem-

bers of the governing body, and the opinion of the majority is as I have stated. It is plain, moreover, on the evidence, that the opinions and the wishes of a great preponderance in number of the inhabitants of this town are also in favor of what the defendants are doing. That does not legalize what is illegal, but it is a matter surely not to be disregarded, on an interlocutory motion, where the court is to exercise a discretion, as, in my opinion, it is here bound to do. The case might be different if it were certain or highly probable that what is proposed would be a public nuisance of a dangerous or oppressive description. My opinion is, that the evidence before us does not show that it is likely to be so, though I agree that what is intended will probably or certainly be in law a nuisance.

For the reasons that I have mentioned, without entering into others which might perhaps be suggested, I am of opinion that the present motion ought to be refused, without prejudice to any question, reserving the costs, and giving the plaintiffs leave, and, if necessary, the Attorney-General leave, to proceed at law by indictment or action as they may be advised. I repeat that what is now done is not to be considered as binding the court to any particular course at the hearing of this cause, when possibly an injunction may be granted.

THE LORD JUSTICE LORD CRANWORTH. I have come to the same conclusion, and so entirely upon the same grounds, that perhaps it is hardly necessary I should say anything. My learned brother has pointed out that the case divides itself into two branches. And in form, no doubt, it does. In substance, however, I cannot but come to the conclusion, that the Attorney-General, and the public here, are a mere fiction, and that the real parties concerned are only those that were parties to the first suit.

Looking at it as a question merely between the plaintiffs and the defendants, I think there is abundant reason why there should not be an interlocutory injunction. I agree that there is no necessity for the intervention of a jury, to teach us that digging up a public highway is a public offence, or a public nuisance; but I am very far from seeing my way to the conclusion, that there is likely to be any private injury to these plaintiffs in the sense of there being an illegal act, an act of which the plaintiffs would have any right to complain. If what the defendants are proposing to do is not open to the objection of being a public offence, I am not prepared to say that it certainly must be such an injury to the plaintiffs as to give them a right of action against the defendants. It may be difficult to lay down parallel lines of pipes without some injury being done to those of the plaintiff; but I think that there is not such a case made out as to render it discreet for this court to interfere interlocutorily by an injunction before the

fact had been established one way or other by a trial.¹ That seems to me to dispose of the question so far as the plaintiffs are concerned.

But then the plaintiffs fall back on what is the alleged injury to the public. Now, I have already said that, in my opinion, this was an afterthought, and constituted no part of the original grounds of this litigation. I observe that the relator is in truth the same as the plaintiff. The grievance complained of is, that in the progress of their works the defendants must do that which would constitute in point of law a nuisance. I dissent from Mr. Rolt's proposition in point of law, that if it be once established that there is a public nuisance, there must be an injunction to restrain it. To what extent will that go? Every day there are nuisances in the streets of London; but it cannot be said that in every case where an indictment would lie there must be a title to an injunction. I have no doubt that what the present Lord Chancellor said, qualified in the mode in which he meant it, is perfectly right. Once establish that the setting up something permanently is a nuisance, and it is immaterial whether it is more or less. And it was upon that principle that I proceeded in the case that was referred to of the Rochdale Canal.² There, if I remember rightly, the plaintiffs were the owners of a very valuable canal. Adjoining owners of property to which the water was necessary paid them a sort of rent (I think they called it a water rent) for taking off a certain quantity of water from time to time. The defendants contended that they had a right to take it without any such license: they, accordingly, did abstract it, and drove the plaintiffs to bring an action against them. The plaintiffs did so, and established their right,—recovering, it is true, only a shilling, because the real question was to try whether there was a right or not. After that the defendants defied the plaintiffs, and said, "You will never recover more than a shilling." I held, that although drawing off a hundred gallons of water was a small thing, for which a plaintiff would not recover more than very trifling damages, yet the defendants were trying to baffle justice in a way that this court would not tolerate. That is the principle on which I understand the Lord Chancellor proceeded in the case of the brick manufactory. What the Lord Chancellor meant to say was this: The court will not let a person set up a nuisance, and say it shall remain because it is very little. If it is a nuisance, and is likely to continue, the Lord Chancellor said that shall not be allowed. But how does that case apply here? It is true, that it may be said to be a violation of the law to dig up or interfere with the road wherever her Majesty's sub-

¹ See *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 443; *Coe v. Lake Co.*, 37 N. H. 254.

² 2 Sim. N. S. 78.

jects have a right of way ; but what is urged, on the other hand, is, that this interference is infinitesimally small, and is much more than compensated in point of convenience to those who will be injured by it by the results which are to follow. Whether that view of the case is correct, it is not necessary to speculate upon ; but it is a satisfactory guide to the discretion of the court to say, that probably the convenience resulting from it will preponderate over the inconvenience.

I think this is not a case in which this court is bound to interfere, because there may be what amounts in point of law to a nuisance, and I concur therefore entirely in the judgment that has been given by Sir George Turner, qualified in the way that my learned brother has pointed out,—that this motion should be refused, reserving the costs, and with liberty to the parties to bring such action or indictment as they may be advised in order to try their rights.

Before the commencement of Hilary Term, 1853, notice of motion was given on behalf of the plaintiffs for the first day of that term, upon new facts rendering it, as it was alleged, necessary for public safety that an injunction should be granted.

1853. January 12, February 1. Before the Lords Justices Sir J. L. KNIGHT BRUCE and Sir G. TURNER. February 8, 16. Before the Lord Chancellor and the LORDS JUSTICES.

On the motion coming on to be heard before the Lords Justices, it was agreed that the cause should be at once decided as at the hearing upon the evidence before the court. It was argued accordingly ; but before any decision was given, their Lordships suggested that it had better be reargued before the full court. Accordingly it was reargued before the full court by one counsel on each side.

Mr. Rolt, Mr. Amphlett, and Mr. Overend supported the motion. *Mr. Daniell, Mr. T. H. Terrell, and Mr. Logie* opposed it.

February 16.

The LORD JUSTICE TURNER. This is an information and bill, the information filed by her Majesty's Attorney-General at the relation of Edwin Unwin, who is the secretary or manager of the Sheffield United Gaslight Company, and the bill by the Sheffield United Gaslight Company, against the Sheffield Gas Consumers Company, for the purpose of obtaining a perpetual injunction to restrain the Sheffield Gas Consumers Company from laying down any gas mains or pipes or other works, in or under the streets or highways of the borough of Sheffield, or any part of them, and from breaking up or disturbing for that purpose the road or pavement of the said streets or highways, or any of them, and from doing any other act whereby the passage of her

Majesty's subjects along the said streets or highways, or any of them, shall be in any respect obstructed or rendered less safe or convenient, or whereby the gas mains or pipes or other works of the plaintiffs may be in any way injured or damaged.

The general outline of the case, without entering into the particular details, appears to be : that there existed from the year 1818 up to the year 1836, in Sheffield, one gas company, that company being incorporated by Act of Parliament ; that in the year 1836 another company was formed which continued to supply the town of Sheffield with gas, with the original company, down to the year 1844 ; that in the year 1844 an amalgamation of those two companies took place under the title of the Sheffield United Gaslight Company ; that in the year 1851, about the autumn of that year, the Sheffield Gas Consumers Company was begun to be formed ; that about March, 1852, the Sheffield Gas Consumers Company was duly registered under the provisions of the Joint Stock Companies Act ; and that thereupon in the month of April, 1852, a bill was filed by the present plaintiffs, the Sheffield United Gaslight Company, against the Sheffield Gas Consumers Company, for the purpose of restraining them from laying down their pipes. At that time no pipes had been laid down by the defendants, the Sheffield Gas Consumers Company, and the case therefore which then came before the court was entirely a case of anticipated mischief. A motion for the injunction prayed by the bill was made before me as Vice-Chancellor, and judgment was given upon the motion on the 24th of May, 1852. I was of opinion that the plaintiffs had not succeeded in making out so clear a case of anticipated mischief as would warrant the court in interfering by injunction, and therefore refused the motion. From the month of May, 1852, nothing further took place till the month of July following, at which time the present information and bill was filed, and thereupon application was again made to me as Vice-Chancellor for an injunction on the part both of the Attorney-General and of the plaintiffs. That motion shared the same fate as the preceding one. I thought that the plaintiffs had not made out a case entitling them to the injunction. My opinion on that subject not being satisfactory to the parties, the case was carried up to the Lords Justices, and on the 6th of August, 1852, the Lords Justices also thought proper to refuse that motion.

It appears that the Gas Consumers Company began to lay down their pipes in the month of October, 1852 ; and in the month of November another notice of motion was given before the Lords Justices for the injunction. Upon that motion coming on, it was considered that it would be better for both parties that the cause should be heard. The cause has been heard accordingly, and it is now for us to con-

sider what is right to be done upon the motion and the hearing of the cause.

The question important to be considered in the present case appears to me to be what is the general principle on which this court interferes in cases of this description ; and I take that principle to be the inadequacy of the remedy which the law gives in such cases. That was distinctly laid down by Lord Eldon in the case of the Attorney-General *v.* Nichol.¹ Lord Eldon there says, addressing himself to the interference of the court in cases of this nature : “The foundation of this jurisdiction interfering by injunction is that head of mischief alluded to by Lord Hardwicke,—that sort of natural injury to the comfort of the existence of those who dwell in the neighboring house, —requiring the application of a power to prevent as well as remedy an evil for which damages more or less would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated by damages, but prevented by injunction.” Lord Eldon, therefore, in that case, clearly refers the jurisdiction of the court to the extent of the injury, and to the preventive power of this court as being superior to the remedy which can be obtained at law.

But it is said that however that may be in a case of private nuisance, which was the case to which Lord Eldon was addressing himself in the case of the Attorney-General *v.* Nichol, it is different in the case of a public nuisance, and that it is the duty of this court to interfere in all cases of public nuisance. The argument is put thus : it is said that no injury or inconvenience which is merely trifling would amount to a nuisance at law, that the very fact of there being a nuisance at law imports that the injury is great and the inconvenience considerable, and, therefore, it is said that the interference of this court must take place whenever there is a nuisance at law. I confess, however, that looking at the principles on which, as I apprehend, this court interferes, it does not appear to me that there can be any sound distinction between cases of private and public nuisances. It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court must rest ; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance and private nuisance is this,—that in cases

¹ 16 Ves. 338.

of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind.

I think, therefore, that the same principle must govern the question as to the interference of the court, whether the case be one of private or of public nuisance. What, then, is the principle by which the court ought to be governed? I take it to be this: whether the extent of the damage and injury be such that the law will not afford an adequate and sufficient remedy. The same principle which governs the court in other cases, in which its jurisdiction is more generally applied, seems to me to apply in such cases as the present. In cases of specific performance the jurisdiction of this court is founded on the inadequacy of the remedy at law. If the specific performance of a covenant be asked, it is not every covenant which this court will perform, but such covenants only as cannot be adequately compensated in damages. So again, in cases of trespass, it is not every trespass against which this court will enjoin; but such trespasses as are, or are assumed to be, irremediable, or at all events material; and so I take it to be in cases of nuisances.

The question, therefore, which we have to consider appears to me to be whether this is a case in which the remedy at law is so inadequate that the court ought to interfere, having regard to the legal remedy, the rights and interests of the parties, and the consequences of this court's interference. Looking at the case in this point of view, it is a mixed case of public and private injury. In considering it, I think it important to separate the two questions of public injury and private injury. The injury to the public which is complained of arises from the interest of the public in the streets of Sheffield: it is said that the streets of Sheffield will be materially impeded by the laying down of the pipes of this company, and by the continual taking up of those pipes for the purpose of repairing them when they have been once laid down. As to the laying down the pipes, according to the evidence as it stands before us, that operation will occasion an inconvenience of two or three days' duration only. I think that in the case of Neepsend Lane, it was proved that there was an interruption of five or six days; but in that case it was proved also that a negotiation was pending at the time either between the two companies or between the municipal authorities of Sheffield and the defendants' company, which prevented the completion of the works there within the period within which they would according to the ordinary course have been completed. The inconvenience, therefore, is partial and temporary: when the pipes are laid down, the works will in that respect be completed. And if this court is to interfere on the ground that the laying down of these pipes will occasion a temporary obstruction in the

streets of Sheffield for two or three days, I am at a loss to see how the interference of this court could be withheld in the case which has been put in the argument of boards erected in the public streets where houses are under repair, or in the case of cellars being made under the public streets, or in the case of the pavement being obstructed by goods being deposited upon it. All these are nuisances in a greater or a less degree ; and if this court is to interfere on the ground that the pavement of Sheffield will be taken up for two days for the purpose of laying down the pipes of this company, it seems to me that it will be equally bound to interfere in the cases to which I have referred. As to the continual taking up of the pavement consequent on these pipes having been laid down, that inconvenience will also, as it appears to me, be partial and temporary only. It will be an inconvenience occurring from time to time in different parts of the town, and not an injury affecting the general body of the inhabitants to any such extent as ought, in my opinion, to induce the interference of this court. It is not to be left out of consideration in determining this question, that to some extent the law has provided a remedy in respect of these inconveniences. There is some remedy under the Highway Act ; and there are boards of surveyors having control of the streets who, it is to be remembered, concur in these measures being taken ; and as to any injury which private individuals may sustain, the law is open to them by actions on the case.

Something has been said in the course of the argument of the danger to the public peace which may ensue from the non-interference of this court ; but surely this court cannot suppose that there is an inadequacy of the civil power to preserve the public peace. I say nothing on the question whose fault it will be if this disturbance of the public peace takes place. It is true, as the plaintiffs admit, that if they do not interfere, the probability is that there will be no disturbance ; but they say that they are justified in interfering, as it is the only means by which they can prevent these illegal acts being done. I do not think, however, that it is competent to parties to come to this court and say that the inadequacy of their legal remedy gives them a right to do acts occasioning breaches of the peace. The argument seems to me to go too far ; it would apply to every case of an illegal act,—to every nuisance or trespass, however trivial ; for any of these nuisances or trespasses might in the result lead to a breach of the peace.

Some observations have been made with reference to the delay in this case, on which it may be right for me to say a few words. I agree with the argument which has been urged on the part of the plaintiffs, that, so far as they, individually as plaintiffs, are concerned, it is im-

possible on this record to impute to them any delay. But with reference to this proceeding, so far as it is a proceeding by the Attorney-General, I do not concur in the argument urged on the part of the plaintiffs, that there is no ground for imputing delay, or that delay can have no influence on such a question as the present. In truth, the case as to the Attorney-General stands thus : The works of this company were begun in October, 1851, and it is not till July, 1852, that the Attorney-General takes any proceeding to restrain the execution of those works. In the meantime the company have been allowed to enter into contracts and take proceedings without any interference on the part of the Attorney-General. That delay will affect the Attorney-General as much as a private individual I am not prepared to say ; but, in my opinion, it is a circumstance to be considered in determining the question whether this court shall interfere, although the application to the court be on behalf of the Attorney-General, and I ground myself in that opinion upon what fell from Lord Eldon in the case of the Attorney-General *v.* Johnson.¹ In that case Lord Eldon distinctly states his opinion to be that delay is to be considered in determining a question of injunction, though the application may be by the Attorney-General on behalf of the public. I think, therefore, that this case fails, so far as the public are concerned.

There remains, then, the question of the private right of the plaintiffs. The question, as I view it, upon this point is, what is the injury to the plaintiffs in their character of a joint-stock company beyond that which the public sustain. It is said that there is damage to their pipes. If so, there is a remedy in an action on the case ; and I do not think that there is any case established of damage to the pipes of the plaintiffs sufficient to justify the interference of this court on the ground of private nuisance. I have been throughout this case very much struck with the great strength of the affidavits made on the first application as to the anticipated nuisance,—the enormous inconveniences which were then anticipated as likely to result to the plaintiffs from the defendants being permitted to lay down their pipes at all,—and what, in my opinion, is the very different aspect of the case on the affidavits as they now stand, showing that the injury anticipated in April, 1852, and so strongly deposed to on that occasion, has not been realized, though it is in evidence that six miles of the pipes of the defendants have been already laid down in the streets of Sheffield. It was suggested with reference to this question of private right that there would be great injury to individuals by reason of the defendants, in consequence of their pipes having been laid in property belonging to others, acquiring an easement in such property. But this seems to

¹ 2 Wils. 87.

me to be a private injury to each individual, and not a nuisance to all the inhabitants; and if the case be considered as one of private injury to each individual, I think it is not a case in which this court could on this record interfere: if the case be considered as one of nuisance to a private individual, it is a nuisance of which some individuals would approve and others disapprove. It is evident from the affidavits that there are many of the inhabitants of Sheffield who would be and are willing and desirous that these pipes should be laid down before their houses, although others may be desirous that it should not be done. It cannot, therefore, be brought forward as a case of common injury to all, and as a case of private injury to each it does not seem to me to be open on the present record.

Another view which has struck my mind with reference to the interference of this court in cases of this description is this: These parties are here coming into equity on purely legal grounds, and in a case in which there may be some possible doubt as to the result of the proceeding at law. I take it that in a case of that description the ordinary course of this court is to allow the proceedings at law to go on, in order that the court may be in a position to see what the result of those proceedings may be. It is upon an equity founded on a legal right that the plaintiffs come, and for an extension of the legal remedy. Ought it not to be seen whether the legal right exists before this court will interfere? The effect of the interference of this court would be to prevent the legal question being tried at all.

Upon these grounds, and on looking, which I have done carefully, through the affidavits in this case, being satisfied that there is not that extent of mischief which, in my opinion, would justify the interference of this court, the conclusion that I have arrived at is that this information and bill ought to be dismissed. If it shall eventually appear that there is any such excessive mischief as is contemplated on the part of the plaintiffs, it will be quite open to them, notwithstanding the dismissal of the bill, to file a fresh information or bill, and make a new case upon new facts; but upon the facts as they at present stand, my opinion is that this information and bill ought to be dismissed.

The LORD JUSTICE KNIGHT BRUCE. In making the order of the 6th of August last, the Lords Justices intended it certainly to be without prejudice to any question, and particularly meant that it should not hamper or interfere with the judicial discretion of the court as to the mode of dealing with the suit at the hearing. If that intention or that meaning is not clearly expressed in the order as drawn up, it has not been drawn up as it ought to have been. I believe, however, that by neither side have they been misunderstood in this respect. My present impression is, that the order, intended and understood as I

have mentioned, having been made merely upon an interlocutory application in the state of facts and circumstances then presented to the court, was not an erroneous or incorrect order. If, however, the question is asked, whether I now consider that in disposing of the motion, so far as I was concerned, I expressed myself with sufficient fulness and altogether correctly, I must own that I have more misgiving as to the proper answer. Probably what I then said was well susceptible of amendment, as well as addition.

An able and eminent member of this bar, whom we have lost, used to say that there was no justice in August. Not agreeing with him to that extent, I do acknowledge that ever since I have been acquainted with the court, there has been a prevalent notion that its light is at that season often in the wane, and I will not undertake to aver that on the 6th of August, 1852, I furnished any assistance towards a contrary opinion. It is, however, not material on the present occasion whether the Vice-Chancellor and the Lords Justices disposed correctly of the motions heard and decided by them respectively last year. Neither of the orders then made, merely interlocutory as they were, can or ought to influence the court now in granting or refusing an injunction. Not only is the motion before it a new motion, we are also at the hearing of the cause, and this upon more evidence than that adduced in August, 1852, and upon facts some of which have occurred since that month. Perhaps the motions refused were properly refused. Perhaps they ought to have been wholly or in part successful. The present question is of a decree to be made.

One point suggested against the informant and plaintiffs is that of acquiescence or laches. I think no such point established. Early and speedily after the first announcement of the defendants' project, the plaintiffs protested against it openly and publicly, and they have uniformly declared and asserted practically their opposition to it. Whether this suit was instituted soon enough to entitle the informant and plaintiffs to an interlocutory order for an injunction may be disputable, but it was commenced, I think, soon enough to warrant them in asking for a decree, if making a case for one in other respects. The expenditure of the defendants has taken place under full notice that it was objected to, and that endeavors were, and would be, in active operation to render it fruitless and useless on the grounds or alleged grounds taken by the information and bill.

Then comes the question, whether the acts done and intended by the defendants, of which the informant and plaintiffs complain, amount, or if performed will amount, to a nuisance in point of law. And upon the evidence now before the court, I think that this question must be answered in the affirmative, if propounded for the pur-

pose, and in the sense, of the information or bill separately, and, therefore, in the affirmative, if propounded for the purpose and in the sense of both together. Various public highways in the town of Sheffield have, since July last, in the prosecution of designs previously announced, been unlawfully broken up for the purpose of laying down the defendants' pipes. The same course of proceeding is intended to be with equal unlawfulness pursued by them in other public highways of the town to an extent still greater. And it must be taken as substantially certain that hereafter (in case of the absence of judicial interference preventively) the highways along or under which the plaintiffs' pipes lawfully, and the defendants' pipes unlawfully, have been and shall be laid, will in various places be from time to time, without just right or lawful power, broken up by the defendants for the purpose of repairing their pipes (whether in consequence of casualties which may happen to affect them or otherwise), and for the purpose of making communications between their main pipes and dwelling-houses, or other buildings. These illegal proceedings, effected and intended, present and future, may perhaps well be said in one sense to be of a temporary or transitory, and not a perpetual or permanent kind. But, from the nature of the case, there is obviously, I think, another, and, probably, a more important sense, in which a character of perpetuity or permanence may properly be ascribed to them. It has been argued that the annoyance (if any) felt, and possible to be feared, must be small, slight, and unfit for this court's interference. But the frequent recurrence for ever, or during a period probably long and unascertainable, of an annoyance, slight in itself (slight I mean if occurring but upon a single occasion, or recurring only at very rare intervals) may much interfere with the reasonable convenience and comfort of life. Upon the evidence now before us, it is, I think, reasonable to believe that during a period probably long and unascertainable, the defendants' proceedings under consideration, unless judicially prevented, will unlawfully be of frequent recurrence, and will unlawfully create, from time to time, often inconvenience to persons who as travellers or passengers may have occasion to use the public streets and highways in Sheffield, to shopkeepers and other inhabitants of the town, and to the plaintiffs; nor, if we now refuse an injunction, can it reasonably, I think, be denied that in respect of these unlawful proceedings, actual and intended, redress, remedy, or punishment may from time to time, for many years to come, be sought at law criminally and civilly, as well summarily as otherwise, to a very inconvenient and burdensome extent of diversified litigation, at the instance of a variety of persons. This the defendants may, it is true, be inclined to disregard. But what they are indifferent to, may be of importance to the plaintiffs,

and to some at least of those on whose behalf, or for whose interest or protection, the Queen's Attorney-General is to be considered as suing here. There are persons certainly who are pleased with the operation of putting the law in motion in its numerous departments, nor dislike its frequent repetition ; this, however, more often vicariously than otherwise ; but, in theory, if not practically, the multiplication of suits and prosecutions must be considered something very different from a blessing,—so far, at least, as her Majesty's unprofessional subjects are concerned.

There is, too, another aspect of this case which may deserve attention. Mr. Overend, before the Lords Justices in January of this year, assumed not unreasonably, and argued on the possibility, that the defendants in the course and by the aid of time may, through submission or acquiescence (this court not interposing), acquire in the soil, or the use of the soil, of the streets and highways where their pipes are proposed to be and are now laid, a right not now existing, which, if acquired, may probably be found of considerable inconvenience publicly as well as privately. I do not know that this argument has been displaced or answered. Certainly, I am aware that the bill in this cause is a bill by the plaintiffs on their own behalf merely. But it cannot be denied that by way of easement or otherwise they have, in the soil of the streets and highways within the range of their Act of Parliament, an interest exceeding and different from that of persons merely entitled to use them for walking, riding, and driving, or to have the approaches along them to their shops, warehouses, and dwellings preserved in an uninterrupted or unobstructed state.

Something has been said on the subject of riots or unlawful assemblies, of skirmishes and battles between the opposite forces, native and auxiliary, of the contending companies, as likely to be rife and serious unless we shall interfere, but into that part of the argument I consider it unnecessary to enter. It seems, however, right to notice the incorporation, whether completely or incompletely, of the defendants, and the quantity of persons thus associated together. They have the advantage and strength of lastingness, union, numbers, and it may well be thought (nor is it new to hold or to act upon the opinion) that infringements, even seemingly slight infringements, of right in respect of land by persons or bodies so circumstanced require especially to be watched with a careful eye, and repressed with a strict hand by a Court of Equity where it can exercise jurisdiction.

The propriety of the bill may probably well be thought open to more doubt than the propriety of the information in the present case, but I consider both to be well founded,—the information, upon the ground of the public and general nature of the nuisance ; the bill, if on no

other account, yet on account of the interest in the nature of a private interest, whether by way of easement or otherwise, in the soil of the public highways of Sheffield, which I have referred to ; that, namely, which the plaintiffs as a company have under their Act of Parliament ; an interest likely, I think (as I have said), to be prejudiced by the defendants' illegal proceedings, not a prejudice in the sense or way of interference with a monopoly (for the plaintiffs cannot truly be said to have any right in the nature of a monopoly), but they are entitled certainly to have their pipes protected, and to exercise freely the powers conferred on them by the legislature, which has, for the general good, placed them under obligations and liabilities that the defendants are exempt from.

It has been urged, and perhaps not without foundation, that the majority, or, at least, a very considerable portion, of those who compose the governing bodies, and of the inhabitants generally, of Sheffield, are disposed against this suit, and wish well to the defendants and their operations, which, it is also plausibly contended, will, on the whole, be rather for the convenience and advantage than to the inconvenience or disadvantage of the town generally. The fact, too (I suppose true), is urged that there are many parts of England, where companies such as the defendants', and constituted for similar purposes, exist, whose works, without any authority from the legislature, and without litigation or objection, have long been and are still interfering with streets and public highways in the manner here complained of and sought to be prevented. Each of these considerations probably deserves some attention, but they are not, I conceive, conclusive in the defendants' favor, and are, in my opinion, outweighed by others.

If this suit is opposed to the views and wishes of a majority of the governing bodies and general inhabitants of Sheffield, the minority do not therefore lose their rights. Their views of what is for the convenience and advantage of the town are not necessarily to be disregarded in a case where they have law on their side ; and if the informant and plaintiffs would have an equity independently of what has been or is going on in other towns or places, they are not to be deprived of it because the inhabitants of those towns or places may through the success of this suit be disturbed or inconvenienced. The legislature is open to all, and, therefore, to the defendants, who, if they shall desire parliamentary authority for their undertaking, and shall make a case for it, will, I dare say, obtain it. The probably great expense of an opposition before committees of the two houses of Parliament has been fairly enough made the subject of remark, but ought not to influence our judgment.

It has been said, too, that there are parish surveyors or local boards,

to whom or to which the defendants have been and are willing to submit themselves; and certain agreements on that subject, perhaps of a lawful, perhaps of an unlawful, nature, have been produced. But neither are the powers of these surveyors or boards of such extent or force or practical utility for the purpose now under consideration, as those which the Court of Chancery can exercise; nor, if they were, could it be right for this court therefore to abdicate an important and useful branch of its known and undoubted jurisdiction; nor can the Attorney-General, or those for whose rights or interest he sues, or the plaintiffs, be required to trust or resort to the activity, discretion, or judgment of any surveyors or board, present or future, changing or unchanging, partial or impartial, wise or otherwise, for the prevention or protection which it is the object of this suit to obtain.

There are legal proceedings pending, with which the relator and plaintiffs upon having an injunction, if they shall obtain one, ought, I think, to undertake to deal, so far as they can, in any manner that this court, upon any application or suggestion from the defendants, now or hereafter, may deem reasonable. But the pendency of those proceedings ought not, in my judgment, to delay or impede the action of this court in a case, where the law and facts appear to me to be free from obscurity; especially since an important statute which, though at present in operation, was, I believe, not so in August last: not forgetting the expressions attributed, and probably with correctness, to Lord Eldon in *Attorney-General v. Cleaver*,¹ but also not forgetting those to be found in *Crowder v. Tinkler*.²

I am of opinion that the informant and plaintiffs are entitled now to an injunction until further order, substantially, though not exactly, in the terms in which they pray it, upon the undertaking that I have just mentioned being given by the plaintiffs and the relator; with liberty for either party to apply: a liberty which may perhaps be especially useful in the event of a certain result of the trial of the pending indictment. As to the costs of this suit, I have entertained, and still entertain, too much doubt to enable me to concur in any order as to any of the costs of the relator, or the plaintiffs, or the defendants.

The LORD CHANCELLOR. This cause comes on to be decided under circumstances somewhat unusual, and whatever may be the result, at least it cannot be said that the subject has not in one form or another received a more than ordinary degree of consideration and discussion. A motion for an injunction was made first in the spring of last year, before Lord Justice Turner, when he was Vice-Chancellor. That was made upon the bill, before there was any information filed,

¹ 18 Ves. 211.

² 19 Ves. 617.

and was refused. An information and bill were then filed, and the motion was renewed. I say renewed, although the application was in some sort a new and distinct motion. But the same question had to be discussed, and Lord Justice Turner, with his usual accuracy and attention, again considered the subject, and came to the conclusion that the injunction ought to be refused. That motion was brought by way of appeal before the Lords Justices, and heard by them a day or two before, but finally decided on the 6th of August, when the Lords Justices were of opinion that the Vice-Chancellor Turner had rightly decided, and affirmed therefore the order which he had made. Application was then made to the Lords Justices in Michaelmas Term last, proposing to renew the same motion, but upon a new state of facts, which had arisen since the former motion had been disposed of; and the Lords Justices then suggested that it would be better for the cause to be set down for hearing upon affidavits, according to a course which has been usefully and frequently adopted of late, and for the cause and motion to be heard and disposed of at once. The parties adopted that suggestion, and the cause came on to be heard before the Lords Justices in the last term. After it had been argued they intimated to me, not having finally made up their minds on the subject, an apprehension that they might not concur in their views as to what ought to be done. And although the legislature has in such cases provided for such a result when that which is before the Lords Justices is an appeal from some other decision, no such provision is made with reference to an original hearing. The Lords Justices in this state of things proposed that the cause should be heard again either by me alone, or by the full court, the latter of which courses I thought much the better one. The case has now been fully and very ably argued, necessarily consuming a good deal of time from the number of affidavits, and I have come to a conclusion against the plaintiffs.

I will state shortly the grounds on which I have arrived at that conclusion. It appears to me that both the Lords Justices concur substantially on this point, that it is a question of degree whether the court will interfere or not. If that be the right view of the case, then the question is, whether or not such a probability of substantial injury to the rights of the public passing along the streets of Sheffield, or the inhabitants using those streets, has been made out as to make it a reasonable exercise of jurisdiction for this court to interfere by granting an injunction. I confess that in the course of the argument a doubt did pass through my mind whether the Lords Justices had rightly decided in August, but I have come to the conclusion, not only that that doubt was not well founded, but to a still stronger conclusion upon the hearing, that there is no case for enabling us to act other-

wise than as we then acted. Is the evil of such a nature as to justify the court in interfering? It is said that the defendants are about to tear up the streets to an extent, on one side represented as 70 miles, on the other as 100 miles. Take it that 100 miles of the streets are to be torn up. It may be that before the defendants complete their works they will have taken up the pavement over 100 miles, but they will never have up above 20 yards at the same time, and they will never have even that length up, they say, for above two days.¹ That agrees with one's experience from what one observes when similar works are going on in the metropolis. They are no sooner begun than ended.

¹ "I agree with Sir Roundell Palmer, that the case of Attorney-General *v.* The Sheffield Gas Consumers Company must be taken on its own circumstances, as must also every other case. But these are principles well established, and one of these principles is that wherever this court interferes by way of injunction in the shape of prevention, as Sir Roundell Palmer said, rather than allow an injury to be inflicted, it does so in cases where the act complained of is one in respect of which there is also a legal remedy, upon two grounds (they being of a totally different character)—first, where the injury is irreparable in the eye of this court, as the cutting down of a tree, although its value may be paid for; and secondly, where the act is continuous, and so continuous that this court acting on the same principle as it acted on in olden times with reference to bills of peace by restraining actions after repeated trials, so now will restrain repeated acts which can only end in incessant actions being brought, will restrain them at once on account of the continuous character of the wrong, which continuous character in itself makes the injury to be grievous, and so far, in the eye of this court, inseparable. As an illustration of this I may refer to the bell case (*Soltau v. De Held*, 2 Sim. N. S., p. 133). No one would dream of coming to this court to restrain his neighbor from tolling a bell once or twice, or eight or ten times, but when the plaintiff's neighbor told him that he meant to toll it thus regularly for all time, the court thought it was a case which would justify its interference. The injury was in itself slight, but it was continuous, and so continuous that the court would at once *brevi manu* arrest the nuisance and save the party complaining from all future annoyance. . . . The Judges in the Sheffield case came to these conclusions, as I stated before, in a much stronger case for an injunction than we have here. They said: Although it is very true that you are about to take up no less than seventy miles of streets, you are about to do it at different times, at no one given point will it be an interruption of more than a couple of days; that may be an indictable offence, but we do not think an injury of that description is, *per se*, such as to justify the interference of this court. No doubt you might have cases in which this court would interfere if a thing were only going to be done for one day, as for instance, if there was a shop with immense traffic in Regent Street and it was proposed to interfere with that traffic, and the complainant came to this court and said that by keeping his customers out of his shop for one day his custom would be diverted elsewhere and so be lost. That might be a ground for the interference of the court, although the shopkeeper might say that he could not inform the court of the extent of his damage because it was not calculable." (Wood, L. J., in *Attorney-General v. The Cambridge Consumers Gas Company, Limited*, 17 W. R. 145, 146.)

The circumstance of the works being performed in this case in a vast number of places in the course of the next two or three years, or the next year, during which time the process of laying down the pipes will be going on, does not appear to me at all to vary the case. One must look at the quantum of evil at each particular place and at each particular moment of time, to determine whether this injunction ought to be granted.

It may be asked by way of illustration, why does not the court restrain persons from coming with barrel organs through a town and disturbing the peace of the inhabitants? No doubt it would be a very serious nuisance if a person with a barrel-organ or bag-pipes were to station himself under one's window all day; that would be a nuisance. But when he is going through a city, you know, he will stop ten minutes at one place and ten minutes at another, and so he will go on all day. If the one sort of nuisance could be restrained, I do not see why the other could not. There is a distinction, no doubt; the one interferes with the soil, the other does not involve any interference with the soil. I do not see in point of principle that this distinction makes any great difference.

But I do not rest this case merely on my own opinion as to its being a very small degree of injury, but I think it may be safely deduced from the acts of the legislature that it is to be so considered. I come to this conclusion from the different statutory provisions to which our attention has been called. The Joint-stock Companies Registration Act¹ contains in the second section a list of certain companies for executing works which cannot be carried into execution without the authority of Parliament, but it does not include gas companies among them, though such companies are certainly within the operation of the Act. When that argument was pressed, I suggested that perhaps the legislature might contemplate a company formed for making gas behind a row of houses, and supplying the inhabitants with gas through their own land with their consent. That was a suggestion that passed in my mind, but I cannot seriously believe it was any arrangement of that sort that the legislature looked to. The legislature must have looked at the fact, that companies may be formed for the manufacture and supplying a town with gas, and may carry into effect the object which they contemplate, without the authority of Parliament. It must have been deemed possible in some way to supply the inhabitants of a particular town or district with gas, without an express Act of Parliament for that purpose. But it was asked, did the legislature contemplate the violation of the law by tearing up the pavement? Two answers occurred to my mind on that subject. Perhaps the legisla-

¹ 7 & 8 Vict. c. 110.

ture thought that this would only be done with the sanction of the surveyors or proper authorities, which would prevent anything taking place which they considered injurious to the public who would pass along and use the road or street in which the pipes would be laid, and that such a discretion might be safely intrusted to those authorities. Or it may be that the legislature did not consider the act of taking up the pavement for such a purpose as this a nuisance at all.

That may probably be the question to be decided on the trial of the indictment. If I thought the question of injunction or no injunction depended on that, I should have probably asked the Lords Justices to concur with me in letting this cause stand over till after the trial of that indictment. But I do not think so. If these proceedings are unlawful, I think the unlawfulness is too slight to warrant this court's interfering by way of injunction.

But I must say that when the cause was argued before the Lords Justices in August last, and I myself said we do not want any Court of Law to tell us that tearing up the pavement was a nuisance, I did not then advert to the particular circumstance of this case, but merely to the general proposition ; and I cannot say that it appears to me absolutely impossible to be held that the taking up the pavement for such a purpose as this is not a nuisance. I do not say how this may be, but the case may be held to be analogous to one of this sort : If I were to station a cart in the street opposite to my door, obstructing the public highway, I might be guilty of a nuisance for aught I know, and I might be liable to be indicted ; but it would be a sufficient answer to say, that the cart was there only a reasonable time and for a lawful purpose. If it is used in the way in which such things are ordinarily used it cannot be a nuisance so to use it. The public highway is for the convenience of mankind, and so to use it cannot be a nuisance. One of the uses is, that people travelling along with a horse, or carriage, or cart, may draw up at a particular door according to their lawful occupation. So, again, if I have a cart come to my house with five or six tons of coal, of course it will be some time obstructing the public highway, but it is difficult to maintain that in an ordinary street that would be a nuisance. All these cases of nuisance or no nuisance arising from particular acts must, from the nature of things, be governed by particular circumstances. If a carriage were to drive up in Belgrave Square, and stand half the day at the door of a house waiting for some person calling there, I do not think that that could be made out to be a nuisance. It may be said to have stayed there an unreasonable time ; but it would be difficult indeed to make out that that was a nuisance. Suppose, however, the same thing happened in the narrow part of the street that runs from Covent Garden to St.

Martin's Lane, I do not know that that would not be a nuisance. Each case must be governed by its particular circumstances. The particular place or object in view must be regarded. I take it that all these questions are of this nature, "Are you using that which is the subject-matter of inquiry in a reasonable way and according to the uses for which it was intended?"

I am of opinion that no case is made out for an injunction. With reference to the future evil of tearing up the streets for the purpose of repairs and the possibility of accidents, I can only say here that I must deal with those considerations exactly in the same way, and inquire whether there is such a probability of serious injury as would induce this court to interfere? Everybody who has lived in this town has lived probably in a house where there have been gas-pipes running along the front of it. Speaking for myself, I can say that I have experience of it for some twenty or thirty years and more, and I have never found any nuisance from such a source. I do not mean to say that evils may not occasionally occur, but I think that the interests of mankind require that those things should be disregarded. I concur therefore with Lord Justice Turner in thinking that this bill and information ought to be dismissed, though I entirely concur with both the Lords Justices that nothing should be said about the costs.

Mr. Rolt. Did your Lordships intimate that it was without prejudice to our filing a new bill?

THE LORD CHANCELLOR. In the Chorley Water-works case¹ we held that the dismissal of a bill would not prevent a plaintiff from filing a new bill upon new facts. You may file a new bill upon new facts if you like.

SWAINE v. THE GREAT NORTHERN RAILWAY COMPANY.
IN CHANCERY, BEFORE SIR JAMES LEWIS KNIGHT BRUCE AND SIR
GEORGE JAMES TURNER, LORDS JUSTICES,
JANUARY 26, 27, 29, 1864.

[Reported in 4 *De Gex, Jones and Smith* 211.]

THIS was an appeal by the plaintiff from the dismissal of his bill with costs by his Honor the Vice-Chancellor Wood.

The case made by the bill was in substance as follows:

The appellant owned a house and land at Stevenage, which was approached by a road adjoining a siding on the respondents' railway at the Stevenage station. The siding had been constructed in 1859 on land belonging to the respondents, and it abutted on the above-

¹ [2 *De G., M. & G.*, p. 852.]

mentioned road, contiguous to and fronting the appellant's property. It had originally been used by the respondents for discharging the contents of their wagons, and for some time past had been used by them for discharging from their trucks and wagons large quantities of dung and other manure, which, after being discharged, were carted away without causing any very considerable inconvenience or annoyance to the appellant.

The respondents had subsequently commenced the practice of depositing and stacking the said manure and other offensive matter brought by trucks on to the siding, and allowing the same to remain so deposited or stacked for a considerable time; and at other times they had allowed the trucks to remain loaded for some weeks on the siding.

The contents of the deposited stacks or heaps of manure, or of the undischarged trucks, were stated to be different sorts of animal dung, decomposed fish, dogs, cats, and almost every species of decomposed animal matter; and the bill alleged that the consequent noisome effluvium was so bad as to render the occupation or enjoyment of the appellant's property impossible, without the greatest discomfort, inconvenience, and danger to health.

The bill proceeded to state that part of the appellant's property was occupied by himself and part by a tenant, who had given him notice to determine the tenancy unless the nuisance was abated.

The appellant, after ineffectual applications to the respondents to abate the nuisance, caused his solicitors to write to them on the same subject: and Messrs. Denton & Hall, his solicitors, wrote accordingly to the respondents on the 14th of November, 1862, complaining also of the very bad state of the only road to the appellant's house and land, caused by the excessive traffic to and from the siding, which rendered it, at times, almost impassable on foot.

A correspondence ensued between the representatives of the parties; but nothing having been done in the way of abating the nuisance, the appellant, on the 9th of January, 1863, filed the bill in this suit, stating to the effect above mentioned, and praying:

(1) For an injunction to restrain the respondents, their agents, servants, and workmen from using the siding in question for the deposit or stacking of dung, manure, or other compost or matter, whereby, or by reason or by means whereof, any noxious, offensive, or unhealthy fumes, vapors, or stenches might be caused or produced or be emitted, or from permitting their trucks or wagons containing any such offensive matter to remain on the siding, or using the siding in such a manner as to interfere with the quiet and wholesome enjoyment by the appellant, his family and tenants, of the said house and premises:

(2) For an account of the damage which the appellant had sustained by reason of the aforesaid wrongful acts of the respondents, and payment of such amount by them:

(3) For payment by the respondents of the costs of the suit; and

(4) General relief.

The appellant, it appeared, had taken no steps to try his right against the respondents at law, nor had he moved in the suit for an interlocutory injunction.

The Vice-Chancellor, referring to *Bateman v. Johnson*,¹ and thinking that, apart from Mr. Rolt's Act (Stat. 25 & 26 Vict. c. 42), the appellant had no *locus standi* in equity, and that that statute gave him none, and moreover that, even had it done so, his remedy was gone by laches and acquiescence, dismissed the bill with costs.

The scope of the arguments on the present appeal, and the result of the evidence in the suit, appear sufficiently for the purpose of this report from the judgment of the Lord Justice Turner.

Mr. Willcock and Mr. Roxburgh for the appellant.

Mr. T. Stevens (*Mr. Rolt with him*) for the respondent.

THE LORD JUSTICE TURNER. I do not think it desirable unnecessarily to decide so important a question as is one of those raised by the respondents in this case: viz., whether the jurisdiction of this court is affected by the Common Law Procedure Act, and upon that point I give no opinion, merely saying that I am not at present inclined to accede to Mr. Stevens' view with reference to the point.

But upon the facts of this case there are two points,—first, whether the appellant is entitled to an injunction; and secondly, whether, if not entitled to an injunction, he is entitled to damages in this court.

I do not understand it to be contended that, if the manure was brought to the station in a proper manner, and was properly dealt with when there, the appellant would have a case for the interference of the court. The case made by the bill and argued at the bar is this: first, that the manure was not proper manure; and secondly, that it was not removed from time to time as often as it ought to have been removed.

Upon the evidence, it cannot be denied that in some instances dead dogs and cats have got into this manure,—that occasionally the manure which was carried was not proper manure. Nor can it be denied that in some instances the manure has remained at the station longer than it ought to have remained. The manure is brought down; the farmer does not send for it on the day it arrives. It must be emptied out of the trucks, and deposited in some place or other.

But the real question is, whether there has been such a continued

¹ Fitzg. 106.

system of carrying manure of a description not proper to be carried, and therefore prejudicial to the appellant, and such a continued system of keeping manure at the station beyond the time necessary or proper for disposing of it, as to induce the court to interfere by injunction.

With reference to this point, and adhering to the opinion expressed by both Lord Cranworth and myself in the case of *The Attorney-General v. The Sheffield Gas Company*,¹ that it is not in every case of nuisance that the court will interfere by injunction; and holding that occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases, there is not in my judgment here a sufficient case for such interference.

The LORD JUSTICE KNIGHT BRUCE. I agree.

JACKSON v. THE DUKE OF NEWCASTLE.

IN CHANCERY, BEFORE LORD WESTBURY, C., FEBRUARY 20, 24,
MARCH 19, JUNE 25, JULY 2, 1864.

[Reported in 3 *De Gex, Jones and Smith* 275.]

THIS was an appeal on the part of the sole defendant, the Duke of Newcastle, from the grant by the Master of the Rolls on the 11th of February, 1864, of an interlocutory injunction in the terms of the prayer of the bill hereinafter stated.

The object of the suit was to restrain an obstruction of ancient lights in a messuage situate in and known as 21 Cockspur Street, by the erection of new buildings opposite of a greater height than had been certain old buildings, whose place they were intended to take.

The plaintiffs, the present respondents, were Edward James Jackson, Robert Edward Johnson, and James Patrick Macdougall, who were the legal owners, subject to the lease after mentioned, of the inheritance of the messuage in question; the respondent Edward James Jackson being also equitable tenant for life, and, with the consent of the others, in possession of the rents and profits of it; and George Dixon and John Smith the occupiers. The occupation was under a lease granted by the owner of the inheritance to one William Newman, who had for upwards of thirty years prior to the date of the lease carried on upon the premises what was, according to the allegations of the bill, a large business as a grocer and tea-dealer, a business which at his death he was carrying on in copartnership with the

¹ 3 De G., M. & G. 304.

respondents George Dixon and John Smith. Under the articles of partnership subsisting between the three, the respondents Dixon and Smith were each entitled to a third as well of the business, which they were still carrying on on the premises, as of the premises themselves, with the right of purchasing their deceased partner's share in both the business and the premises. For the exercise of this right they were in treaty with the administratrix of William Newman, in whom the legal estate in the lease was vested; and she, under the circumstances, declined to join as a co-plaintiff in the suit, and was, by amendment, struck out from the list of plaintiffs in which she had appeared in the original bill.

The case made by the amended bill was to the following effect:

During the whole period of William Newman's occupation of the premises comprised in his lease, they had consisted of the ground-floor of a front shop looking towards the north towards Cockspur Street, and extending backwards towards the south forty feet or thereabouts, and communicating in the rear with a counting-house, which projected fifteen feet or thereabouts beyond the main outer wall of the house, and looked towards the south upon a narrow roadway or passage called Red Lion Yard.

The counting-house was, and always had been, lighted by a single window nine feet wide and four feet five inches high, and was separated from the front shop by a glazed partition, through which was admitted a borrowed light to the southern extremity of the shop, which but for that would have been too dark to allow the ordinary business of the trade to be carried on there without some artificial means of lighting.

In the basement floor beneath the counting-house there was another window, also looking upon Red Lion Yard, and upon the flat, projecting roof of the counting-house there was, and had been for above thirty years, erected a small greenhouse or conservatory, the external framework whereof, towards the south, was immediately over and in a continuous line with the external southern wall of the counting-house beneath.

Immediately behind the greenhouse, and opening upon the flat, projecting roof of the counting-house, there was, and always had been, the window of the back room on the first floor of the house, which received its light partly through the glazed casing or framework of the greenhouse, and partly through the open space between the top of the greenhouse and the main outer wall of the house, and above the window of the first floor back room were the corresponding windows of the back rooms of the second and third floors respectively.

All the windows above described were ancient lights.

Previously to the alterations after mentioned, there stood, and had for upwards of fifty years existed, on the north side of Red Lion Yard, immediately opposite the back premises belonging to No. 21 Cockspur Street, and at a distance of thirteen feet from the outer wall of the counting-house, a range of stabling, the outer wall of which was nineteen feet four inches high to the eaves of the roof, over which the light had access to the whole of the windows belonging to the counting-house at an angle to the horizon exceeding forty-five degrees.

Some time in 1862 these stables were pulled down and their site cleared, and in 1863 the appellant obtained a lease of it.

In July, 1863, excavations were commenced upon the cleared site, with a view to the erection of new buildings thereupon, and in consequence of information acquired by the respondents George Dixon and John Smith, and by them communicated to the solicitors of the respondent Edward James Jackson, the latter gentleman communicated with the architect of the appellant in the matter, and through him obtained an inspection of the plans for the proposed new buildings.

From these it appeared that the height of the latter would be thirty feet high to the eaves, the roadway of Red Lion Yard being still kept thirteen feet wide.

Upon the remonstrance of the respondent Edward James Jackson's surveyor, a revised plan was adopted on the part of the appellant, according to which the height of the proposed building was reduced to twenty-eight feet six inches, and the roadway of Red Lion Yard was widened to fifteen feet instead of thirteen feet; and this plan was definitively adhered to, and began to be carried into execution on the part of the appellants, notwithstanding the still existing and expressed dissatisfaction of the respondents.

The latter thereupon filed this bill, submitting that the building in course of erection by the appellant would, if completed according to the revised plans, be twenty-eight feet six inches high to the eaves of the roof, or nine feet higher than the building which formerly stood on the same site, and that the effect of such additional height would be so to darken and obscure the counting-house above referred to, and so to obstruct the passage of light therefrom to the southern end of the front shop, as materially to interfere with the use and enjoyment of the premises, either as a residence or for purposes of trade; that the proposed building would also intercept a considerable quantity of light and air which formerly obtained access to the conservatory over the counting-house and the back room on the first floor of the house, and that the general result of the proposed alterations would be

seriously to injure the market value of the house and premises as property.

The prayer of the bill was (1), that the appellant might be restrained by injunction from erecting or continuing to erect the intended or any other wall or building upon the site of the stables in Red Lion Yard, lately taken down as in the bill mentioned, of a greater height in any part thereof than the elevation of the old buildings as they formerly stood thereon, so as to darken or obscure any of the respondents' ancient lights, or to obstruct the free access of light and air as theretofore to the respondents' premises, or any part thereof, and from building in any manner or doing any act upon the site of the old building in Red Lion Yard whereby the owners or occupiers of the house and premises No. 21 Cockspur Street might be prevented from enjoying the same amount of light and air as they had hitherto enjoyed without interruption from the owners or occupiers of the former stables in Red Lion Yard; (2) that the appellant might be ordered to pay the costs of the suit, and (3) for further or other relief.

The respondents moved for an interlocutory injunction in the terms of the prayer of the bill, which his Honor the Master of the Rolls granted, after having satisfied himself by personal inspection of the premises that the respondents had made out their case.

From the injunction so granted the present appeal was brought.

Mr. Hobhouse and *Mr. Fischer* for the appellant.

At the conclusion of the arguments for the appellant, the Lord Chancellor directed the case to stand over for either side to adduce further evidence as to the importance of the light derived to the respondents' shop through the counting-house window, as to which point his Lordship said that he was not adequately informed by the evidence already before the court. As to the basement window and the greenhouse, and the first floor window, his Lordship intimated a present impression against the respondents' case, as also to the counting-house window, the counting-house being regarded as a mere counting-house; and his Lordship added that he was not at all disposed to let the jurisdiction of the court be exercised, except in cases in which it was impossible to do justice without the interference of the court.

March 19.

The case now came on again for further argument on additional evidence, the Lord Chancellor stating that he had himself followed the example of the Master of the Rolls and made a personal inspec-

tion of the premises in the interval which had elapsed since the former hearing.

Mr. Hobhouse and Mr. Fischer for the appellant.

Mr. Selwyn and Mr. R. Ryder Dean for the respondents.

June 25.

The LORD CHANCELLOR. I have felt some difficulty in disposing of this application.

It is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a court of equity.

Something more is required than that amount of injury for which damages may be recovered at law. As observed by Lord Eldon, this court will not interpose upon every degree of darkening ancient lights and windows; but the standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief or to prohibit the continuance of the nuisance has not been defined with any certainty.

In *The Attorney-General v. Nichol*,¹ which was an application for an injunction to restrain the building of a wall which would darken the ancient lights of a hospital, Lord Eldon is represented as saying: "The foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighboring house requiring the application of a power to prevent, as well as remedy, an evil for which damages more or less would be given in an action at law."

The sentence is not accurately worded, but it may be collected that Lord Eldon meant to say, that where the darkening of the ancient windows of a dwelling-house materially injured the comfort of the existence of those who dwelt in it, the court would interfere by injunction.

This rule or standard would have no application to a manufactory or business premises which are not occupied otherwise than for the purposes of some trade or manufacture.

But, upon a similar principle, where the obstruction of the ancient lights of a manufactory or of business premises renders the buildings to a material extent less suitable for the business carried on in them, it is a case for injunction, and not merely for compensation in damages.

The foundation of the jurisdiction appears to be that injury to

¹ 16 Ves. 338, 342.

property which renders it in a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The court considers that injury of this nature does not admit of being measured and redressed by damages.

It is true that in *The Attorney-General v. Nichol Lord Eldon* is reported to have said, "I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground," that is, for injunction.

But there is here some error in the report. Lord Hardwicke made no such general observation. In the case referred to, which is that of *The Fishmongers' Company v. The East India Company*,¹ Lord Hardwicke says: "It is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city; and here will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground."

It is clear, therefore, that what Lord Hardwicke meant to determine, and did determine, was this,—that the shutting out of a view or prospect will not afford a ground for the interference by way of injunction, even though it be attended by a diminution of the value of the premises. He did not decide that a diminution of value by the obstruction of ancient lights is not a ground for an injunction.

The peculiar difficulty which exists in the present case is of this nature.

If I am to look to the house of the plaintiffs, as it now is, and to the use which is now made of it, and not to take into account any future change or different use of the premises, then I am clearly of opinion that the new buildings, as they are proposed to be erected, will not materially injure the comfort of the existence of those who dwell in the plaintiffs' house, or render it less suitable for the business which is now carried on in it, to such a material extent as to require the interference of this court by injunction.

It is necessary to explain the particular facts of the case as I have ascertained them.

In the first place, I must remind the parties concerned that the Master of the Rolls proceeded upon conclusions of facts derived from his own inspection of the premises. This was no doubt done with the consent of both parties. I also have followed his example in that particular; because I thought it impossible to sit in judgment on

¹ *Dick.* 163, 165.

his Honor's order unless I had the same or equal advantages of information in respect to the premises which were possessed by his Honor. I am by no means clear, however, that this is a course which a judge in a court of equity ought to adopt, and for this reason,—a judge is bound to pronounce his decision according to the evidence before him, but his inspection of the premises may bring him to a conclusion directly opposed to that which is established by the evidence, and the order then will *ex facie* proceed upon evidence which, according to the weight of it, would warrant and require a different conclusion from that which is embodied in the order.

However, upon an examination of the premises, I was perfectly satisfied that the complaint, so far as it related to two of the particulars mentioned—namely, the basement window, and the window behind the greenhouse on the first floor—is altogether without foundation.

But there remains the complaint with regard to the principal subject, the window of the counting-house.

It is very difficult to convey a right apprehension of the premises as I received it from ocular inspection, when contrasted with the manner in which they would appear to a person reading only the affidavits.

The complaint before me was, that the window of the counting-house would be so far darkened as materially to interfere with its use, and further, that the window of the counting-house was the source of light to the shop itself, which lies in front of the counting-house, that light being received into the shop through a glazed partition by which the shop is divided from the counting-house.

That which is called the counting-house I find to be a very small room with a low ceiling, and having at an elevation of between five and six feet from the floor a long narrow window running the whole length of the room, and looking to the southeast. It is accurately described in the tenth paragraph of the bill: "The counting-house is and always has been lighted by a single window nine feet wide and four feet five inches high, and is separated from the front shop by a glazed partition." The window runs up to the ceiling, and the base or sill of the window is, as I have said, at a considerable elevation from the floor. What gives the room the denomination of a counting-house is the existence of a high desk, to which you ascend by a couple of steps, and which has been necessarily elevated to that extent in order that the person sitting or standing for the purpose of writing at the desk may obtain light through the window.

The room appears to be used for that purpose occasionally only. It is not likely that a small grocer's shop would require the constant

presence of a clerk or clerks in a counting-house. It is called the counting-house because the books of the shop are kept upon the desk, which is raised in the manner that I have described.

With respect to the glazed partition, no doubt it was intended for the purpose of obtaining a borrowed light at the back of the shop. The whole business of the shop is conducted at the counter in the front part, and the value of the borrowed light appears to have been very little appreciated, for the panes of glass in the glazed partition were exceedingly dirty, and were obstructed by packages piled up against them, which plainly showed—a conclusion warranted by the whole condition of the premises—that the light obtained from the window of the back part of the shop was not essentially necessary for the conduct of the business therein. Everything that would have to be sold would be brought to the counter in the front part of the shop, and would be seen and exhibited by the light obtained from the front window.

The argument before me proceeded greatly upon the obstructions already made to the light of this counting-house window. I am not of opinion that that argument is well founded. It is true, that previous to the erection of some of the houses forming part of the terrace which has been built by Messrs. Trollope to a considerable height, the counting-house enjoyed an open prospect not only to the south-east, where it remains open, but also to the southwest. It is true, that those buildings excluded from it sunshine from the southwest; but it is equally true, that there is a wide space by which it now receives air and sunshine from the south-southeast; and it is certainly true, that the proposed buildings will in some degree interfere with the access of that light and air.

I am driven then to consider this point, which I believe to a certain extent to be new.

I find a threatened obstruction, which will no doubt abridge the light now received through the window of the counting-house; but it will still leave, beyond all doubt, an abundance of light for the ordinary operations which are now carried on in the counting-house. First of all, then, it is not a case in which I can say that the abridging of the light which is now received in this small room, called a counting-house, will, in the language of Lord Eldon, materially impair "the comfort of the existence of those who dwell in the house," and I cannot say that the abridgment of the light will, to such a material extent, detract from the value of the counting-house, considered as an integral portion of the business premises, as materially to affect the suitableness of those premises for the purposes to which they are now applied.

But then I am sensible that it is quite possible that premises in that situation may hereafter be applied to another purpose, and made applicable to a different business, in which the proposed abridgment of light and air will operate most materially to the prejudice of the owners of these premises, and may interfere to a considerable degree with their valuable application and adaptation to some future business different from that which is now carried on there.

The question then that I have to determine is this: whether I can interfere by way of injunction, when that injunction will be founded, not upon the extent of present injury requiring that interference, but upon an injury which, having regard to a possible future destination of the premises, may materially affect their value.

I cannot find that the question has been anywhere decided. I cannot find that it has been in any authority adverted to. The ground of the jurisdiction when stated is always stated with this accompaniment, that it must be an injury for which damages at law can be obtained.

If I regard the injury for which damages at law can now be obtained, it would be the injury done simply to the counting-house by the proposed diminution of light, a diminution which I believe would leave still the light quite sufficient for all the purposes to which the room is now applied. It is perfectly true, that these premises, when they cease to be a grocer's shop, may be converted into a jeweler's shop, where the sunshine and the light at the back of the premises received through the window of the counting-house may be of the greatest possible value in the conduct of that business; or they may be applied for a silk-mercier's shop, where the requisite quantity of light for the purpose of distinguishing colors and the shades and hues of color may be of the greatest importance. The obstruction therefore may injure the premises possibly hereafter; but the obstruction at the present time does not injure the premises to such an extent as, having regard to the rules which I have extracted and adverted to, would warrant the interference of the court by way of injunction.

It is undoubtedly true, that not only may a tenant of premises threatened with a nuisance of this kind apply to this court for an injunction, but the owner of the reversion may also apply. But I apprehend that both in the one case and in the other the application must be founded upon the present existing injury, and that future possibilities cannot be speculated upon by the court.

At the same time, I am very sensible of this, that great injury may in reality be done by an interference with property, at present not attended with that amount of injury, but which amount of injury may

be consequent upon a very probable future application and use of that property. Of course, in speaking of the future use of the property, I assume a use where the aperture of the window would remain the same as it is now, because any future complaint must still be founded upon the existence of the ancient light. The words "ancient light," however, do not in the smallest degree import that the window itself shall remain of the same construction and shape; for example, the windows of this court, which are the old-fashioned casements, may be replaced by large sashes consisting of one piece of plate glass, and of course therefore affording a much greater and more abundant supply of light; but the aperture must remain the same.

In this state of things, the course that I propose to adopt is this: I shall direct that the order which I make shall not be drawn up until the day after the next sitting of this court. I will give leave to the counsel of the plaintiffs to try to be more successful than I have been myself in finding any authority that will warrant me in looking to the possible future use that may be made of the premises; and if they shall not be successful in enabling me to arrive at a different conclusion from that which I have been compelled to arrive at, then I propose to frame my order in something like the following words: "Dissolve the injunction, but without prejudice to any future application"; there may be circumstances attending the building which may render another application necessary and more successful; "and the plaintiffs are to be at liberty to make any application they may be advised to make touching the damage sustained by them, and are also to be at liberty to bring any action at law," rather than to come here and have the damages assessed. I shall not deprive them of that opportunity,—"and the defendant is not without leave of the court to move to dismiss this bill for want of prosecution."

I have considerable difficulty in arriving at this conclusion, which, I am aware, may stop short in point of the exercise of jurisdiction of that which the reason of the case would require, if I could find any authority to warrant me in going the length to which I thought it would be reasonable to go. But I have found nothing which authorizes me to look into the possible future, or to speculate about the future condition of the premises; and I am obliged therefore to confine my right of interference to that which the exigency of the present circumstances justifies and renders necessary.

That exigency does not, in my view of the case, extend to an injunction. I apprehend that the harm done to the plaintiffs is one which in the present condition of things may be satisfactorily and fully redressed by damages, and does not require the preventive relief.

July 2.

The case was again mentioned on this day by Mr. Selwyn, who said that the respondents' counsel had been unable to find any authority for the interference of the court by way of injunction, on the ground of possible future injury to the property injured; but that the parties had been in communication with a view to a pecuniary settlement of the matter; and it was finally arranged, Mr. Hobhouse consenting on the part of the appellant, that the matter should stand over for a week from this day for an agreement for pecuniary compensation to be arrived at between the parties; in default of which, the Lord Chancellor expressed his willingness to decide the whole question as to damages and costs, without further evidence or argument, or without any further action as the matter then stood.

LINGWOOD *v.* STOWMARKET COMPANY.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., NOVEMBER 9,
15, 1865.

[*Reported in Law Reports, 1 Equity Cases 77.*]

In this case an interim injunction had been granted restraining the defendants, the Stowmarket Paper-making Company, Limited, from discharging refuse from their works into a river, and it was now moved to make the injunction perpetual.

The defendants submitted to the motion, and the only point to be considered was whether the words, "to the injury and damage of the plaintiff," ought to be inserted in the order; the defendants contending that without them it might be held they were restrained from pouring anything, however minute in quantity, except pure water, into the river, and the plaintiff maintaining that the words were unnecessary and erroneous.

Mr. Phear in support of the motion.

Mr. Eddis and *Mr. Downing Bruce* for the defendants.

The VICE-CHANCELLOR thought the words ought to be inserted, because the plaintiff must be damaged in order to entitle him to relief; and in this instance it was possible that the defendants might pour their noxious liquid into the river in such small quantities as not in any way to affect or injure the plaintiff, whose mill was four miles lower down the stream. His Honor said he would mention the point again.

November 15th.

SIR W. PAGE WOOD, V.C. The only question is as to the insertion of the words, "to the injury and damage of the plaintiff," in the

order whereby the defendants are to be restrained by perpetual injunction from pouring the refuse of a paper-mill into a river.

I do not find any regular course of authority established on the point, but what was done by Vice-Chancellor Wigram, in framing an issue to be tried by a jury in the case of *Dawson v. Paver*,¹ was, to insert the words I have mentioned. The terms of the issue were, "Whether the drainage made, or effected, or intended, at the time of the filing of the plaintiff's bill, to be made or effected by the defendants, into the ancient watercourse in the pleadings mentioned, will or would, if completed, *to the damage and injury of the plaintiff*, obstruct the drainage of the plaintiff's lands"; the object being to point the consideration of the jury to the question whether substantial damage would be done if the proposed works were carried out. And this direction was expressly carried into effect by the declaration, a minute of which is given at the end of the report;² for the words are to restrain the defendants from using the drain, etc., without providing an outlet sufficient *to prevent the drainage of the plaintiff's lands being obstructed*. The words imply that there must be some injury to the plaintiff.

In Mr. Bidder's case, where I particularly took care to show that it was a matter of doubt whether the discharge of offensive matter into the river would affect a resident living two or three miles down the stream, I came to the conclusion that evidence of some degree of injury did exist, but that it was by no means clear that that might not be avoided, and the nuisance wholly prevented by the noxious matter being absorbed before it could reach the land of the defendants; and, accordingly, I find the words, "to the injury of the plaintiff," inserted in the minute of the decree, as given in the last edition of Seton on Decrees, p. 894.

Therefore, I propose to put the order in this form, almost following the words of the notice of motion: "Let a perpetual injunction be awarded to restrain the defendants, the Stowmarket Paper-making Company, Limited, their servants, agents, and workmen, from discharging from their works, in the plaintiff's bill mentioned, into the weir or stream in the bill also mentioned, to the injury and damage of the plaintiff, so as to cause it to flow to the plaintiff's land, mesuage, and mills therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the plaintiff, any such refuse or other matter as was discharged by the defendants from their said works into the said river or stream previously to the filing of the said bill, or any noxious fluid or other foul matters whatsoever to the plaintiff's injury or damage."

¹ 5 Ha. 422.

² Ibid. 439.

I desire to add that whilst I do not wish to encourage application to the court upon trivial matters, on the other hand, I am far from holding out the notion that anything like large or heavy damages must be recovered before the plaintiff can be assisted. I can find no other cases besides those I have mentioned, in which these words have been actually inserted, but in almost all the cases words are used which involve the necessary condition of injury being done. I think, therefore, as that is so, and as I have adopted that course on a former occasion, that I must do the same here, and put the order in the same form as was done in Mr. Bidder's case. The two cases are very similar; only here the alleged evil takes place higher up the stream. There may be means of purifying the stream before it reaches the plaintiff's works, but if it does reach them in a polluted state, he has a right to be protected.

CRUMP *v.* LAMBERT.

IN CHANCERY, BEFORE LORD ROMILLY, M.R., JANUARY 22, 25;
FEBRUARY 8, 1867.

[Reported in *Law Reports*, 3 *Equity Cases* 409.]

THE plaintiff, in 1864, became the purchaser of two semi-detached leasehold houses at Walsall, in Staffordshire, for an unexpired term of seventy-two years. The houses were situated at one side of a ridge known as Mount Pleasant, and commanded a view of the country in the neighborhood of Walsall, the manufacturing part of the town being situated principally on the other side of the ridge, although there were factories of different kinds at no great distance. The plaintiff had resided in one of the houses ever since he became the purchaser thereof.

In 1865, the defendants, who were iron bedstead manufacturers, began to erect, and had since completed, a factory on a piece of land adjoining the plaintiff's property. The factory contained two blast furnaces, one of which was in constant use for the purpose of smelting iron, in which process coke was burnt, and lime was used as a flux. A considerable quantity of coal was also consumed in driving a steam engine, and at smiths' forges within the factory; and the smoke and effluvia were carried away by a chimney fifty feet high, and about fifty-eight yards from the plaintiff's house. A number of men and boys, stated by the defendants not to exceed forty, were employed in hammering iron bars for the purposes of the manufacture.

The plaintiff alleged that a large quantity of smoke constantly issued from the chimney of the factory, accompanied by offensive

effluvia; that such smoke and effluvia, and the noise proceeding from the factory, were a nuisance which had diminished the value of his property, and also interfered with the comfort and health of himself and family; and in 1866 he filed his bill to restrain the defendants from allowing smoke and effluvia to issue from the chimney of the factory, and from allowing noises to be made, so as to occasion nuisance and injury to the plaintiff.

A motion had been made for an injunction, but, by arrangement, it stood over; and the cause now came on to be heard on motion for decree. A considerable mass of evidence, of a somewhat contradictory nature, was adduced upon the question of nuisance; but, as will be seen from the judgment, the court was of opinion that the existence of the nuisance was clearly proved.

Mr. Southgate, Q.C., and Mr. W. F. Robinson, for the plaintiff.

Mr. Jessel, Q.C., and Mr. Everitt, for the defendants.

February 8.

LORD ROMILLY, M.R. The plaintiff in this cause is the occupier and owner of a house in Walsall, in Staffordshire, and complains that the defendants have recently erected an iron factory adjoining his grounds, the smoke, noise, and effluvia proceeding from which occasion a nuisance which he applies to this court to abate. The defence is, in substance, twofold; first, one of law, and, secondly, one of fact. The defendants say that smoke alone does not entitle a person to come here for an injunction; that a disagreeable smell alone does not entitle a plaintiff to ask for an injunction; that noise alone does not entitle a plaintiff to ask for an injunction. Secondly, they insist that the evidence shows that there are no noxious gases emitted from the defendants' works, and that the evidence on the part of the plaintiff is grossly exaggerated, and that, having regard to the smoke and noise which always prevails in and about Walsall, the defendants' factory has only made an inappreciable addition to what already existed.¹

The evidence shows, as indeed might have been expected from a house situated within the town of Walsall, although at the extremity of the town, that before the defendants erected their present works a great deal of smoke and some noise occasionally affected the plaintiff's property, and that more or less of smoke is constantly in the neighborhood, arising from factories which have existed for more than twenty years, but after giving full consideration to all the evidence on this subject, I am of opinion that the smoke of the defendants' factory

¹ A portion of the opinion discussing the question of what constitutes a nuisance has been omitted.—ED.

has produced a completely new state of things as regards the plaintiff's house and grounds, and that the smoke and noise materially interfere with the comfort of human existence in the plaintiff's house and grounds. Indeed I think the evidence overpowering on this point, and that it is not really touched by the evidence adduced by the defendants.¹

[His Lordship then referred to the evidence, and continued:]

I am of opinion that the smoke and noise proceeding from the works of the defendants constitute a substantial nuisance, and that the plaintiff is entitled to the assistance of this court to have it abated. I do not feel sufficient doubt about the case to induce me to grant an issue. I shall make such an order as the Vice-Chancellor made in *Walter v. Selfe*,² that is, an injunction to restrain the defendants, their servants, workmen, and agents from allowing smoke and effluvia to issue from their said factory so as to occasion nuisance, disturbance, and annoyance to the plaintiff, as owner or occupier of the tenement in the bill mentioned; and a similar injunction to restrain the defendants, their servants, workmen, and agents from making, or causing to be made, noises in the factory, so as to occasion nuisance, disturbance, and annoyance to the plaintiff, as the owner or occupier of the said messuage in the bill mentioned. I cannot make the order more precise; it is always a question of degree; and if the defendants can continue to carry on their works in such manner as to avoid any substantial issue of smoke or noise, they will not violate the injunction. Whether they do so or not may have to be tried in another proceeding. The costs must follow the event up to and including the hearing. Reserve liberty to apply.

¹ "But the defendants contend that the plaintiffs have no right to complain of any pollution of the Hebble occasioned by them, because there are many other manufacturers who pour polluting matter into the stream above the plaintiffs' works, so that they could never have the water in a fit state for use, even if the defendants altogether ceased to foul it. The case of *St. Helen's Smelting Company v. Tipping* (11 H. L. C. 642; 11 Jur. N. S. 785) is, however, an answer to this defence. Where there are many existing nuisances, either to the air or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow, that if the plaintiffs were to make terms with the other polluters of the stream, so as to have water free from impurities produced by their works, the defendants might say, 'We began to foul the stream at a time, when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time, when we began, you had no right to object to.' Lord Chelmsford, L.C., in *Crossley v. Lightowler*, L. R. 2 Ch. Ap. 478, 481.—ED.

² 4 De G. & Sm. 315.

WALKER *v.* BREWSTER.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., NOVEMBER 4, 1867.

[Reported in Law Reports, 5 Equity Cases, 25.]

THIS was a suit for the purpose of restraining the defendant, the lessee of Molineux House and grounds, Wolverhampton, from holding in such grounds certain fêtes as advertised, or any other fêtes of a similar character, and from permitting the grounds to be used for displays of fireworks, or for public music or dancing, or for any other public entertainment whereby large numbers of idle persons might be drawn together in the immediate neighborhood of plaintiff's premises.

The plaintiff was the owner in fee simple of a house and grounds, called Waterloo House, in the outskirts of Wolverhampton, and divided by a narrow pathway from the grounds of Molineux House, which occupy an area of about four acres.

Molineux House had been occupied for many years, until 1860, as a private residence, and afterwards by a Mr. Tyrer as a school, and in May, 1867, the premises were leased to the defendant Brewster, the proprietor of a music-hall in Wolverhampton, for two years.

Brewster entered into possession, and shortly afterwards advertised and held in the grounds a monster fête on Whit-Monday, the 10th of June. These Whitsun diversions, which were attended by great numbers of persons, were followed by fêtes of a similar character every Monday and Friday evening, with music, dancing, and fireworks (omitting the fireworks on Fridays). The plaintiff's complaint was thus stated in his bill :

"These fêtes also have brought together, and still continue to bring together, great crowds of persons, many of whom are of idle and dissolute habits, to the great annoyance of the plaintiff and the inhabitants of his house. The bands of music play for nine or ten hours each Monday and Friday without cessation. Great numbers of boys climb on to the walls of the plaintiff's grounds adjoining Molineux House, and destroy their privacy. The shoutings of the assembled people are loud and continuous, and almost beyond endurance. The reports from the fireworks are frequent and most annoying, and have so frightened the plaintiff's horses in their stables as to cause them to break loose from their fastenings, and sustain serious injury. The rocket-sticks fall thickly on the roofs of the plaintiff's house and outbuildings, and in the garden, breaking the glass of the greenhouses and conservatories, and there is great fear of the buildings on the plaintiff's grounds, especially his stables, being set on fire by the fireworks falling upon them. The whole effect of these fêtes is to destroy the peace and comfort of the plaintiff and his family, and to render it impossible for the plaintiff to

continue to occupy his said house and premises unless the said fêtes be stopped. The said fêtes are, in fact, a most grievous nuisance, and if allowed to proceed, will destroy the possibility of the plaintiff's house being used as a gentleman's residence, and depreciate the value of his estate by from £1,000 to £2,000."

The bill, which was filed on the 1st of July, was directed specially against three "monster fêtes" advertised for the 8th, 9th, and 10th of that month, during the fair week.

On the 4th of July the plaintiff moved for an injunction. The defendant had not then had time to answer plaintiff's affidavits, and as the plaintiff declined to give an undertaking to be answerable in damages, the question was ordered to stand over until the next seal.

On the 11th of July, upon an undertaking by the defendant not to let off any fire-balloons, or ascending fireworks, or any fireworks the sparks from which could fall on plaintiff's buildings, the motion was ordered to stand over until the hearing of the cause, with liberty to apply to expedite the same.

The cause now came on for hearing.

Evidence was given in support of the plaintiff's case by several residents in the Waterloo Road, affirming the statements in the bill, and showing that the neighborhood of Waterloo Road had up to lately a quiet and retired character, with houses of a superior class, occupied by persons of standing and position, who had selected the locality by reason of its freedom from noise, crowd, and bustle. The witnesses all deposed to the noise and din from powerful brass bands playing continuously for several hours, and distinctly audible two and a half miles off, the distance of the band from the plaintiff's house being variously stated, but certainly not exceeding 100 yards; to the danger from fire-balloons and rocket-sticks; and especially to the nuisance from the concourse of idle vagabonds on fête nights in the Waterloo Road, "as if a fair were being held," the state of things on such occasions being thus described:

"The holding of these fêtes attracts a very large concourse of persons of the lowest class to congregate, both within the grounds and in the Waterloo Road outside, completely choking the said road, rendering it almost impassable to persons wishing and having occasion to pass, who have to crush their way through, and are exposed to great danger and insult. The repose of the neighborhood is completely disturbed by the continuous din of music within the grounds, and the shouts, noise, and confusion, and the disgusting language employed by the rabble and mob so congregated together in passing to and from the entrance to the said grounds."

It was also stated by the plaintiff's gardener, that on the mornings after fêtes he had frequently found rocket-sticks in the grounds of plain-

tiff, and noticed that the glass roof and other parts of the greenhouses had been broken. In reference to the annoyance from men and boys occupying plaintiff's garden wall, the gardener stated that on the 8th of July, at 11 P.M., after the music had ceased, and the crowds were dispersing, three men mounted the wall, and remained there in defiance of him, until he went up and insisted on their leaving.

Evidence was adduced on behalf of the defendant as to the respectable character of the entertainments, which had been attended by the mayor and several of the town council (who had expressed their approbation), and also by the borough members.

The chief constable of Wolverhampton, who resided in Waterloo Road, and had never felt any annoyance, had frequently attended the fêtes, and also received reports of them from his officers. In no instance had there been any disturbance, nor any case for inquiry before the magistrates originating there; and, in his opinion, the position of the lessees afforded the fullest guarantee that no improper characters would be admitted, nor any act of immorality allowed to take place there.

The two policemen stationed at the entrance for the purpose of excluding prostitutes and disorderly persons, stated that on the first only of these fêtes had any prostitutes applied for admission, and that on being refused they at once retired; that no disorderly or disreputable characters whatever had been admitted, and that the utmost order and decency of conduct and conversation had been maintained during the fêtes.

A Mr. Sills, residing in Waterloo Road, denied that any inconvenience to himself or family had arisen from the entertainments given by defendant.

It was also stated that fêtes of a similar character had been held at intervals for the last ten or eleven years in Molineux Grounds—sometimes as many as three in a week—with any complaint on the part of the plaintiff or any of the other residents in Waterloo Road, and, in particular, several fêtes had been given without objection during Mr. Tyrer's occupation of Molineux House. Only two of these fêtes had been held for purposes of charity, all the others having been at the risk and for the profit of the givers.

In reply to this evidence, the plaintiff adduced the evidence of five persons, all residing in Waterloo Road, all of whom complained in very strong terms of the nuisance, and described the neighborhood as having been quiet and peaceable down to the end of Tyrer's tenancy.

In reference to the fêtes held during his tenancy, Tyrer, who was a schoolmaster, stated that during his occupation of Molineux House and grounds between September, 1862, and the 25th of March, 1867, he was induced to allow the grounds to be used for fêtes on two occasions

only, in both instances during his school vacation. One of these fêtes was on behalf of the United Order of Foresters Friendly Society, the other on behalf of the Widows and Orphans' Fund of the Manchester Unity of Odd Fellows, and the proceeds were divided amongst the charitable institutions of the town. Tyrer went on to state that although these fêtes were patronized by the borough members and many of the principal inhabitants, and to some extent conducted under the control and supervision of the clergy, and the authority of the police, "the attendant noise and confusion was a great nuisance to myself and neighbors, independently of which the scenes of vice and immorality which came under my personal observation in the evenings rendered such fêtes an abomination. Nothing would have induced me to have allowed a continuance thereof."

In reference to the evidence given by the chief constable and policemen, plaintiff stated that although they might have prevented the well-known prostitutes and disorderly people from entering the said grounds from the Waterloo Road entrance, it was nevertheless a fact that great disorder and noise occurred during the holding of the said fêtes, and numbers of such characters assembled in the Waterloo Road, to the great annoyance of the inhabitants of the neighborhood.

Mr. Druce, Q.C., and Mr. Fry, for the plaintiff.

Mr. Kay, Q.C., and Mr. Horsey, for the defendants.

MR. MOLINEUX, the lessor, who had been made a defendant to the bill, and disclaimed any interest in the matter, was dismissed with costs, to be paid by the plaintiff.

SIR W. PAGE WOOD, V.C. When this case was before me upon the motion for an interlocutory injunction, I was impressed with the defence of acquiescence which was raised against the plaintiff. But when one comes to look into the matter, this defence breaks down altogether, as there is no evidence whatever of any single entertainment having been given for hire in these grounds during the last ten years. The only two which were allowed by Mr. Tyrer, the plaintiff's predecessor during the four years immediately preceding the plaintiff's tenancy, were for the benefit of charitable institutions, and the affidavit of Mr. Tyrer showed that even these entertainments were so productive of annoyance that he never allowed any other fête to take place as long as he was the occupant of the property. What, then, is the nuisance complained of? Three things are alleged: First: The noise of a very powerful band of eighteen performers, which performs regularly twice a week, from two or three in the afternoon, until eleven at night. The second evil complained of is a serious one, the throwing up of rockets, to say nothing of the noise and glare of the fireworks, in the immediate neighborhood of plaintiff's premises, and the risk to his garden and greenhouses from the

falling of the rocket-sticks. The third nuisance complained of is exactly the case of *Rex v. Moore*,¹ which stands upon grounds that are unimpeachable. The plaintiff complains that when these fêtes are given crowds of idle people are drawn together who, being idle, do not pass on, but occupy the road and the plaintiff's wall so as to obtain a view of the fireworks and other entertainments. On this part of the case no serious contradiction is to be found in the evidence. The chief constable of police and two of his officers have been brought forward, and state that the entertainments have been conducted in a most orderly and respectable manner, and that admittance has been refused to persons of improper characters. The defendant, very much to his credit, seems to have been anxious to prevent anything like immorality, and stationed policemen at the entrance to keep out prostitutes and other improper characters. But the complaint of the plaintiff is not against the persons who are actually in the grounds, but against those who have been shut out and had admission refused to them. In *Rex v. Moore* it was expressly stated that the defendant had driven off the disorderly people from his own grounds in the same way as the defendant here excludes them from these gardens; and yet it was held that the collection of these disorderly people outside amounted to a nuisance. It is to be observed that the chief constable, in his evidence as to the orderly character of the entertainments, does not allude to this main ground of complaint on the part of plaintiff as to the conduct of the crowds collected outside, which is supported by evidence on behalf of the plaintiff as to the annoyance produced by the blocking up of Waterloo Road by a crowd on the fête nights. Everything is, in fact, admitted on this head by the defendant's witnesses. The policemen stationed at the entrances say that on one occasion some prostitutes had applied for admission, and that on being refused admittance they at once retired. Where did they retire to? It is only reasonable to suppose that they retired to the crowd from which they had come—that crowd which is complained of, and through which the people have to force their way. According to *Rex v. Moore*,² which is in many ways a very instructive case, the thing is plain and clear. The very argument addressed to me by Mr. Kay was there mentioned. It was urged, that if the defendant was to be held guilty of a nuisance by the collection of crowds outside who were not admitted to the grounds, and over whom he had no control, not a ball or rout could be given in London without rendering the entertainers liable for a nuisance. Mr. Joy, during his argument, referred to what was said by Lord Ellenborough in *Rex v. Cross*,³ "in allusion to the mention by counsel of the possibility of a hundred indictments every time a rout was given by a lady at the west end of town."

¹ 3 B. & Ad. 184.

² 3 B. & Ad. 184.

³ 3 Camp. 224.

He says Lord Ellenborough puts this question : “‘ Is there any doubt that if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street and obstruct the transit of his Majesty’s subjects, the persons who cause and permit such coaches so to wait are guilty of a nuisance?’ By which he appears to have meant not that the lady herself ought to be indicted, but only such of her guests as blocked up the way by ordering their carriages to wait instead of drawing off and returning when wanted. They, of course, as obstructing the way by their equipages and servants, would be responsible, and not the person who invited them. And the present case is more favorable to the defendant, for he did not even invite the persons who committed the nuisance.”

It was also observed by Mr. Joy, during the same argument : “ It does not follow that when a collection of idle people commit a nuisance the attraction which drew them together may not be perfectly innocent, otherwise the exhibition of prints in a window would render a print-seller liable to an indictment wherever the footpath was obstructed by the number of gazers.” In answer to this observation it was decided, in the case of Carlile, the printer, that the exhibition of prints in a shop window in Fleet Street, by causing the collection of a crowd, amounted to a nuisance. The truth is, that common sense must be used with reference to transactions of this kind. If persons use their houses for the enjoyment of life, and one of the ordinary enjoyments of life is supposed to be the occasional entertainment of one’s friends at a rout, it would be very difficult for any one complaining of the noise and inconvenience caused by a rout to obtain an indictment at law, still more so, I apprehend, to persuade this court to interfere. At all events, that differs altogether from a case like this, where the defendant makes a business and a profit by giving entertainments, which are carried on so as to induce this crowd of idle people to collect in large numbers to the annoyance of the plaintiff. In this respect the language of Lord Tenterden in *Rex v. Moore*¹ is exactly applicable to the present case : “ The defendant asks us to allow him to make a profit to the annoyance of all his neighbors. . . . If a person collects together a crowd of people to the annoyance of his neighbors, that is a nuisance for which he is answerable.” There the nuisance complained of was the trampling of grass and destruction of fences. Here it assumes a much worse form, as persons cannot reach their houses without having to force their way through these crowds. Again, in the same case, Littledale, J., says : “ It has been contended, that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object ; but I do

¹ 3 B. & Ad. 184.

not agree with the other position, because if it be the probable consequence of his act he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result he will be answerable for it."

Mr. Justice Taunton refers to Hawkins' *Pleas of the Crown*, where it is laid down "that all common stages for rope dancers, and also all common gaming houses, are nuisances in the eye of the law . . . not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood." It appears to me, therefore, that a clear case of nuisance is established in the collecting of the crowd alone;¹ and further, that I am not bound to specify the other nuisances to which this gentleman has been subjected. Having regard to the fact of this court having restrained the ringing of bells,² I confess I have a strong opinion that the setting up a powerful brass band, which plays twice a week for several hours in the immediate vicinity of a gentleman's house, is a nuisance which this court would restrain. I have a still clearer opinion that the noise of fireworks, as contrasted with the noise of the tolling of a bell, to say nothing of the damage that may be occasioned by falling rocket-sticks, is a serious nuisance. But that the collection of crowds is a nuisance has been fully established; and in the neighborhood of a populous town the letting off fireworks and performance of powerful bands will collect together crowds as a necessary and not merely a probable consequence. On this ground, therefore, the plaintiff is entitled to relief, and there will be a perpetual injunction to restrain the defendant Brewster from continuing to hold, and from permitting to be held, upon the grounds in the bill mentioned as being in his occupation, any public exhibition or other entertainment whereby a nuisance may be occasioned to the annoyance and injury of the plaintiff.

Mr. Druce suggested that in order to prevent the whole question from being left open, the decree should be prefaced by some declaration of the court being of opinion that the nuisance complained of in the bill amounted to a nuisance.

¹ "Walker *v.* Brewster, which was much relied on, was also a case of outdoor performance, where people would assemble outside the ground, since the fireworks could be seen and the band heard almost as well outside the ground as within it. The rule is well deduced from the cases by Mr. Kerr in his work on *Injunctions* (page 337), and the evidence here falls short of bringing the case within that rule. The plaintiff cannot complain of the temporary crowding occasioned by people going to the circus or leaving it; and no such continuous crowding is shown as to justify the interference of the court." Sir C. J. Selwyn, L. J., in *Inchbald *v.* Robinson*, L. R. 4 Ch. Ap. 388, 396.—ED.

² *Soltau *v.* De Held*, 2 Sim. (N. S.) 133.

The VICE-CHANCELLOR. I have thought of that; but I prefer to leave the injunction in this general form. It seems quite enough if a nuisance has been established which is sufficient ground for an injunction. The band might be modified. It is difficult to fix the amount of annoyance that might be occasioned. You must prove the nuisance whenever you come to commit.

COOKE *v.* FORBES.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., NOVEMBER 20,
22; DECEMBER 4, 5, 11, 1867.

[*Reported in Law Reports, 5 Equity Cases, 166.*]

THE bill was filed by William Cooke, Samuel Hindley, and David Law, of Friday Street, in the city of London, wholesale carpet dealers, and dealers in cocoa-nut fibre and cocoa-nut fibre matting, lessees for a term of twenty-one years, from the 14th of November, 1849, of a manufactory at Old Ford, Bow, Middlesex, adjoining the river Lea, and James Figgis, of Cannon Street, Old Ford, Bow, tenant of the premises, and manufacturer of matting for the other plaintiffs, against James Forbes and John Abbott, who, in the year 1863, became and had since been occupiers of premises abutting on those of the plaintiffs towards the north.

From the allegations in the bill it appeared that the work carried on by Figgis consisted of weaving cocoa-nut fibre into mats, for which purpose the matting had to be immersed in bleaching liquids, and then hung out to dry. Ever since May, 1863, fumes had issued from the works of the defendants, who were manufacturers of sulphate of ammonia and carbonate of ammonia from the ammoniacal liquor of gas works, particularly when the wind was in the north-west, north, or north-east, the effect of which was to turn the plaintiffs' matting, when hung up to dry after bleaching, from a bright to a dull and blackish color, requiring the material to be again dyed, at considerable expense, the color even then being permanently injured. These fumes were also alleged by the bill to be offensive to the smell, and injurious to the health of Figgis and his family, who were inmates of the manufactory, and of his servants and workmen; but this part of the case was abandoned in the reply.

Although the defendants commenced as above stated in May, 1863, the plaintiffs only in March, 1865, ascertained positively that the fumes from the defendants' works were the true cause of the injury, since which time they had remonstrated in vain.

Up to the time of filing the original bill (31st of October, 1865), the plaintiffs were unable to discover the nature of the defendants' process,

save that, from certain tests, it appeared to be a process which threw off sulphuretted hydrogen, ammonia, and other noxious gases in large quantities; and up to the same date all inspection by the plaintiffs had been refused by the defendants.

The bill alleged damage, and prayed that the defendants might be restrained "from carrying on the said works of the defendants in such a manner as in any way to operate to the damage of the plaintiffs, or any of them, or of their or any of their servants, workmen, or agents, or of the said manufactures so carried on by the plaintiff, James Figgis, as aforesaid," and for payment of such damages as the court might think the plaintiffs entitled to receive.

On the 23d of February, 1866, the defendants filed an answer, in which they stated that shortly after the commencement of their occupation in 1863, they erected valuable plant and machinery for carrying on the business above stated, and extraordinary precautions were taken to prevent the escape of free ammonia and sulphuretted hydrogen, with the double object of economy, and of obviating all injurious effects.

They said that after their occupation, they began erecting a new chimney shaft, whereupon Figgis inquired what the works were to be, and on being told the nature of the manufacture, said he would consult his solicitor, and try and stop the business. No steps, however, were taken by him as threatened; and the works were erected without opposition.

Defendants' premises adjoined the river Lea, and consisted of a manufactory, and a wharf called Iceland Wharf. To this wharf the ammoniacal liquor was brought in tightly-closed barges, from whence the liquor was pumped by steam through pipes into the manufactory, and submitted to a series of processes, which the answer minutely described, and then stated as follows: "In the conduct of all these operations, from first to last, the utmost precautions are taken to prevent the escape of any sulphuretted hydrogen or ammonia, and such escape is effectually prevented, and so completely so, that the test papers remain unaffected though held in the steam arising from the open vessels where the sulphate of ammonia is evaporated."

It was stated further, and not disputed, that from the manufacture of carbonate of ammonia "no sulphuretted hydrogen, or any other noxious fume," issued.

The defendants accounted for the discoloration of the plaintiffs' goods by saying that they believed the bleaching liquid consisted of a weak solution of oil of vitriol, and that the effect of the bleaching was for a time to put a face on the matting so as to discharge, to some extent, the dark color of the fibre, but the use of the acid was liable to cause discoloration by reason of its counteraction when it became concen-

trated in the act of dyeing, and the bright color at first imparted was not permanent. They further stated that, since 1865, from causes which they specified, "the best cocoa-nut matting has been, and is still, made without bleaching or dyeing."

Finally, they denied that the discoloration complained of was caused by fumes from their works, or that any injurious fumes issued either from their works or from the river adjoining.

Issue having been joined on the 26th of June, 1866, on the proposal of the defendants, the plaintiffs not objecting, the evidence was ordered to be taken *viva voce*.

The plaintiffs established the fact that they used no sulphuric acid, and that the basis of their bleaching liquid was chloride of tin, which they said was darkened by the sulphuretted hydrogen.

On the other points the evidence will be found fully discussed in the judgment.

Mr. Grove, Q.C., Mr. Little, Q.C., and Mr. Locock Webb, for the plaintiffs.

Mr. G. M. Giffard, Q.C., Mr. Kay, Q.C., and Mr. Martineau, for the defendants.

December 11.

SIR W. PAGE WOOD, V.C., after stating the nature and frame of the suit, continued:

The question of health was, I think very properly, abandoned in reply, inasmuch as the circumstances are strong to show that no such injury has been inflicted.

The case, then, is reduced to the question of the injury which is alleged to have been done to the plaintiffs' manufacture. [His Honor read the principal allegations in the bill.]

It is important to see what the issues raised in the pleadings are, because the defendants do not say (indeed, they could not have said, although it was so argued for them by their counsel at the bar): "We are entitled to pour noxious fumes into your property, and you are not entitled to complain if you should suffer any injury in your manufacture; more especially regard being had to your choosing to establish in this neighborhood a manufacture which requires such delicate handling as that a particular gas will affect it and impair its value." What they say by their answer, impliedly, if not distinctly, is—that their manufacture does require the greatest possible precautions to avoid the emission of sulphuretted hydrogen, which everybody knows to be a very offensive gas; that they have taken those precautions successfully, and that, in fact, no damage has been done. I may here say, I think it proved beyond dispute in this case, that sulphuretted hydrogen does

produce an injurious effect to a certain degree on the manufacture of cocoa-nut matting, owing to the use in the bleaching liquid of chloride of tin, which when affected by sulphuretted hydrogen is turned to a darker color.

In that state of things, I apprehend the issue is reduced to one of mere fact, not simply whether or not any damage has been done, but with reference, also, to the extent of the damage, and as to the necessity of granting an injunction, upon which point I took time to consider the whole case.

As regards the state of the law upon the question, whether or not a person is entitled, because there are noxious vapors existing already in the neighborhood, to add to that accumulation by creating additional noxious vapors, and pouring them in upon his neighbor's property, it is sufficient to say that it is well settled by the case of *St. Helen's Smelting Company v. Tipping*,¹ where the summing up of Mellor, J., was approved by the House of Lords, and must be taken to have laid down the correct law on the subject.

Consequently, it appears to me quite plain that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and that his neighbor is not at liberty to pour in gas which will interfere with his manufacture. If it can be traced to the neighbor, then, I apprehend, clearly he will have a right to come here and ask for relief.

But the real point I have to consider and determine is, whether a person carrying on a manufacture in itself lawful—a manufacture required to be carried on with great precaution in order that the neighbor may not be injured, but still using these precautions, and yet occasionally, by accident, injuring that neighbor—whether that is a case for an injunction, or whether it is not a case in which, when the neighbor is injured, his remedy must be by action. In other words, whether a man is to be placed under the necessity of carrying on his manufacture subject to perpetual applications for commitment for contempt, because his manufacture is of such a character as that, whenever an accident does occur, some damage may be inflicted upon his neighbor.

I take it in such a case as I have mentioned, although I have not found any authority expressly pointing to it, there is a limit which must be drawn. If a person has a quantity of material necessary for the manufacture of gunpowder, of so dangerous a character that if the slightest accident occur the damage done to his neighbors is irreparable—gunpowder being an article that if kept in quantities near any public highway, or near any property where individuals are living, is itself a nuisance, and held to be so in law—in that state of things the court

¹ H. L. C. 642.

will interfere at once by injunction. I acted upon the same principle in the jute case, Hepburn *v.* Lordan.¹ I thought it was within the doctrine of the gunpowder case, that a person could not be allowed to expose jute to dry where the consequences of a slight accident would be fatal to everybody around. Here I have nothing of that description. This is an instance of a person carrying on a manufacture which, if his neighbor had not happened to have another manufacture of great delicacy, probably would not have caused any injury to the neighbor. Still, he has not a right to injure his neighbor's manufacture at all; and if it had been proved to me that the injury was of such a character as I have described, a grave injury occurring every time that an accidental escape took place—or if it had been proved to me that there had been a constant repetition of the injury, then, I apprehend, the proper course would have been to grant an injunction.

But if, on the other hand, it should be proved—and that is the conclusion I have come to upon a careful consideration of the evidence—that the injury, though it may have occasionally happened, is, to the whole extent of it, not traceable to these works, then, notwithstanding the authority of the St. Helen's Case, the plaintiff will not be entitled to an injunction. Or, if there be no right asserted by the defendant to injure his neighbor; if, on the contrary, the assertion by him is that he does not do it, or that, if he does, it is simply from accidental circumstances, which from time to time happen, and for which the plaintiff may have a remedy in damages; and if it appears that that is what the case amounts to upon the evidence, it does not seem to me that the proper remedy is by injunction in this court.

I have referred to the case of Attorney-General *v.* Sheffield Gas Consumers Company,² in which Lord Justice Knight Bruce differed from Lord Justice Turner and the Lord Chancellor. [His Honor reviewed that case at length, and observed that there the injunction was refused because the injury, which consisted of hindrance to traffic from the taking up of parts of streets by a private gas company, was neither serious nor continuous. His Honor then continued:]

Now, I have to inquire what is the extent of the injury here? Upon the whole evidence I do not find anything to satisfy me that there were more than three occasions, at most, during the period of four years and a half since the defendants' manufacture commenced, when injury of any description was done. The question then being as I have before described it, I confess the case appears to me to be one much more governed by the doctrine which was referred to in Attorney-General *v.* Sheffield Gas Consumers Company³ than any of those cases where the injury is either very vast, or of very sudden or frequent occurrence, or

¹ 2 H. & M. 345.

² 3 D. M. & G. 304.

³ 3 D. M. & G. 304.

where the right is set up to inflict the injury. It is not because counsel argued that the defendants would have a right to do this—that being one of the points of law which they thought it right to submit to the court—that therefore I am to assume that the defendants make it. As I have said, I do not find that the defendants have ever asserted a right to pour out anything deleterious upon their neighbors.

As to the extent of the damage, I am left extremely in the dark; but, as far as the evidence goes, if I had to decide upon it as a jury I should not feel competent to assess anything more than nominal damages. The only satisfaction I have in disposing of the case on these grounds is, that a jury would not have assisted me, because with a jury I could only have tried the particular cases on the particular days specified, of which days I have already given the plaintiff the benefit. I think that he has shown evidence which might have satisfied a jury that upon two days mischief was done. I think as to the third there may be a doubt. He may have the benefit of the doubt, but a jury could not tell me that there was a single other day upon which it happened, because there is no evidence to go to a jury as to damage on any other day.

The result, therefore, of the whole case is, that I must dismiss the bill. I do not think it a case for an injunction, and considering that the bill was filed so late as it was, and considering all the opportunities given to the plaintiff to make out his case, of which he did not avail himself, I am bound to dismiss it with costs, without prejudice to any action he may be advised to bring if he thinks he can get damages.

THORPE *v.* BRUMFITT.

IN CHANCERY, BEFORE SIR W. M. JAMES AND SIR G. MELLISH, LORDS JUSTICES, APRIL 29, MAY 1, 1873.

[*Reported in Law Reports, 8 Chancery Appeals, 650.*]

P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of M. P. and M. agreed to alter their boundary, and substitute a new passage for the old one. M. accordingly, in 1854, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to P., his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tyrrels." By another deed P. re-leased his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M., occupying warehouses on his property, and the bill was filed to prevent the defendants

from allowing carts and wagons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard.¹

Mr. Hardy, Q.C., and *Mr. Langworthy* for the appeal of Brumfitt and Firth.

Mr. Fry, Q.C., and *Mr. Smart* for Stead's appeal.

Mr. Whitehorne for other defendants

Mr. Southgate, Q.C., and *Mr. Locock Webb* for the plaintiffs, were not called on.

SIR W. M. JAMES, L. J. The plaintiff cannot complain, unless he can prove an obstruction which injures him.² The case is not like one of trespass, which gives a right of action though no damage be proved. In the present case, I cannot come to any other conclusion than that arrived at by the Master of the Rolls, that the right of access to the inn-yard has been interfered with in a way most prejudicial to the plaintiff. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy wagons. If a person who was going to put up his horses at the inn was stopped by the loading or unloading of wagons, he would probably at once go to another inn. Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant. It is urged that no case is shown of Stead having done anything before the bill was filed; but this is no defence to a defendant who by his answer justifies what the other defendants have done, and insists on the right to do the same. The defendants seem to have a notion that they have as much right to use the passage for loading and unloading wagons as the plaintiff has to use it for the purpose of passing over it. But the practice of loading and unloading has arisen since the grant of the right of way, and has not been continued long enough to confer an easement.

¹ This statement of facts is taken from the head notes.—ED.

² Only so much of the opinion is given as deals with this question. The opinion of Mellish, L.J., has been omitted.—ED.

There is therefore nothing to prevent the plaintiff from insisting on having a right of way not interfered with by obstructions such as are complained of.

SALVIN v. NORTH BRANCEPETH COAL COMPANY.

IN CHANCERY, BEFORE SIR W. M. JAMES AND SIR G. MELLISH,
LORDS JUSTICES, JUNE 9, 10, 11, 23, 24; JULY 14, 1874.

[*Reported in Law Reports, 9 Chancery Appeals, 705.*]

THE plaintiff was tenant for life of a mansion-house and about 485 acres of land, called Burnhall, situated in the county of Durham, having in the neighborhood and on all sides of his estate many collieries, some of which have been worked for thirty or forty years. The defendants had, in 1870, opened or enlarged a coal pit called the Littleburn Colliery, 400 yards from one of the plaintiff's plantations and 1,000 yards from his mansion-house, and had erected there coke ovens increasing by degrees to the number of 254. These works, in fact, intersected the lands of the plaintiff, and the plaintiff, in February, 1873, filed the bill in this suit to restrain the defendants from allowing any effluvia to issue from their works so as to occasion nuisance to the plaintiff or diminish the value of his estate. The defendants alleged that their works did no real injury to the woods or lands of the plaintiff; and that there were already so many collieries and coke-works in the neighborhood (the nearest being half a mile off), that the colliery and coke ovens erected by the defendants made no perceptible addition to the smoke.

A great number of affidavits was filed on both sides, and many of the witnesses were cross-examined before the Master of the Rolls, who dismissed the bill with costs.¹

¹ 1874. March 17.

SIR G. JESSEL, M.R. The plaintiff is the owner of a mansion-house and of a valuable estate in the county of Durham; the defendants are a coal company who have sunk a pit for the purpose of obtaining coal from a colliery, and have erected at or near the mouth of that pit a very large number of ovens, which they are using, in accordance with the custom of that part of the country, in making coke. The plaintiff alleges, and the defendants deny, that the result of those operations is to cause an emission of a considerable amount of smoke and gases, which produce a substantial injury to the plaintiff's property situate in the neighborhood of these works.

The real question which I have to decide—for there is no question about the law of the case—is, whether or not that allegation is proved to my satisfaction. Now the law, as I said before, is plain. Counsel on both sides have referred with equal confidence to the case of the St. Helen's Smelting Company *v.* Tipping (11 H. L. C. 642), as laying down the law on the subject; and I agree that

The plaintiff appealed.

Mr. H. Mathews, Q.C., Mr. Edmund James, and Mr. Trevelyan for the plaintiff

Sir H. James, Q.C., Mr. Waller, Q.C., and Mr. MacLachlan for the defendants.

The facts of the case and the effect of the evidence are sufficiently stated in the judgments of the Master of the Rolls and the Lords Justices.

SIR W. M. JAMES, L.J. In this case the Master of the Rolls has dismissed with costs the bill of the plaintiff.

The bill, in substance, sought, by a mandatory injunction, to prevent a better case could not have been referred to, or one which has more bearings on the questions which I have to try. The Judge who tried the cause was Mr. Justice Mellor, and he told the jury that an actionable injury was one producing sensible discomfort to the person. Then he went on to say that, in an action for nuisance to property arising from noxious vapors, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. He told them further, that when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that, with respect to the latter, it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

That ruling was upheld by the House of Lords, and I take it as having established, in the first place, that the injury must be visible, by which I understand visible to ordinary persons conversant with the subject-matter. I do not think that this condition is satisfied by getting a scientific man to say that, by the use of scientific appliances, microscopic or otherwise, he can state that there will be in future time an injury. I do not think that that would be sufficient. I take it that there must be a present injury visible to ordinary persons conversant with the subject-matter, and such an injury as would entitle a jury to give substantial as distinguished from nominal damages. I consider that to be the meaning and opinion of the learned Judge. That meaning is very much confirmed by what was said by the learned Lords in deciding that case, especially by Lord Cranworth and Lord Wensleydale.

Lord Cranworth says, adopting the words of Mr. Justice Mellor, "It must be plain that persons using a limekiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." Lord Cranworth then goes on to say: "I always understood that to be so; but in truth, as was observed in one of the cases by the learned Judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property." Therefore it must be a serious injury of some kind. Then he refers to a case of his own, and

vent the defendants, who are a great colliery company, from erecting or working any coke ovens or other ovens to the nuisance of the plaintiff, the nuisance alleged being from smoke and deleterious vapors.

The Master of the Rolls thought it right to lay down what he conceived to be the principle of law applicable to a case of this kind, which principle he found expressed in the case of St. Helen's Smelting Company *v.* Tipping,¹ in which Mr. Justice Mellor gave a very elaborate charge to the jury, which was afterwards the subject of very elaborate discussion and consideration in the House of Lords. The Master of the Rolls derived from that case this principle : that in any

says that he thinks Mr. Justice Mellor could not have possibly stated the law better. Then Lord Wensleydale says :—[His Honor then read the judgment of Lord Wensleydale.]

I do not think there is any contest between the learned counsel on both sides as to the law. They have both stated that the real question I have to try is whether a substantial injury, meaning an injury for which a jury would give substantial damages, has been inflicted on the plaintiff.

The case of the plaintiff may be fairly divided into two complaints. The first complaint is, an injury to personal comfort, and as to that there are two observations to be made. First of all, is the injury of such a nature as substantially to interfere with the comfort and enjoyment of the plaintiff as owner of the mansion-house and grounds in question? Secondly, if it is so, does it come from the defendants' works?

As regards the first point, I have no doubt whatever. As regards the second, I think it must be answered in this way, that it does not all come from the defendants' works ; and I think it does not, even as to the major part, come from the defendants' works. I think that the state of things, so far as regards this part of the case, was not substantially altered by the defendants' works.

[His Honor then commented on the evidence, coming to the conclusion that the quantity of black smoke from the other collieries was very considerable before the colliery in question was established, and that this colliery did not introduce a new state of things, so far as personal comfort went. And as to the injury alleged to be done to the wood by the deleterious gases emitted by the coke ovens in question, His Honor was of opinion that such injury was not shown as in the St. Helen's case, where substantial damages were awarded. No trees had died, and the woods of the plaintiff were in fair order ; nor had the crops on the adjoining lands been injured. No doubt the ovens might have done some slight damage to the trees, but the evidence did not show that any serious damage had been done, though the scientific botanists had said that there were signs of damage, not however visible to ordinary persons. It was admitted that some of the trees in the Tarwell Hall Wood did show signs of injury, but there was no proof that this was caused by the coke ovens, or that the injury had not begun before the defendants' works were erected.]

For these reasons, I think that the plaintiff has not made out his case ; and that, as he comes here strictly upon legal grounds to ask for an injunction upon the ground of substantial injury, the only course I can now take is to dismiss the bill, and of course the costs will follow.

¹ 11 H. L. C. 642.

case of this kind, where the plaintiff was seeking to interfere with a great work carried on, so far as the work itself is concerned, in the normal and usual manner, the plaintiff must show substantial, or, as the Master of the Rolls expressed it, "visible" damage. The term "visible" was very much quarrelled with before us, as not being accurate in point of law. It was stated that the word used in the judgment of the Lord Chancellor was "sensible." I do not think that there is much difference between the two expressions. When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right; and, as I understand the proposition, it amounts to this, that, although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purposes of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shown by a plain witness to a plain common juryman.

The damage must also be substantial, and it must be, in my view, actual; that is to say, the court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank or to the seashore, although after the lapse of years they become perfectly measurable and ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected.

It would have been wrong, as it seems to me, for this court in the reign of Henry VI. to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes.

With respect to this particular property before us, I observe that

the defendants have established themselves on a peninsula which extends far into the heart of the ornamental and picturesque grounds of the plaintiff. If, instead of erecting coke ovens at that spot, they had been minded, as apparently some persons in the neighborhood on the other side have done, to import ironstone, and to erect smelting furnaces, forges, and mills, and had filled the whole of the peninsula with a mining and manufacturing village, with beershops and pig-styes and dog-kennels, which would have utterly destroyed the beauty and the amenity of the plaintiff's ground, this court could not, in my judgment, have interfered. A man to whom Providence has given an estate, under which there are veins of coal worth perhaps hundreds or thousands of pounds per acre, must take the gift with the consequences and concomitants of the mineral wealth in which he is a participant.

But in this particular case the bill itself does not allege any sentimental case, or any prospective, contingent, or remote case of nuisance. On the bill as it stood, and on the evidence in support of that bill, there was a case of absolute nuisance of startling magnitude. And on the affidavits in support of his case it really seemed to me scarcely possible to conceive that any answer or any avoidance could have been successfully made by the defendants. But when the case on the part of the defendants came to be heard, and when their evidence came to be read, every observed fact, and every scientific conclusion from the fact, was directly, absolutely, and completely traversed.

The only thing which, to my mind, was unmistakably established by the evidence on both sides was the utter worthlessness of affidavit evidence in such a case as this. The affidavits were before the Master of the Rolls, and were very carefully considered by him. The witnesses who were selected on each side as the proper sample witnesses for cross-examination were cross-examined before him, and to some not inconsiderable extent were cross-examined by him; and after a hearing extending over days, and an examination very carefully conducted, the Master of the Rolls came to the conclusion that the plaintiff had utterly failed to make out his case, and that there was no proved instance of a single tree killed or substantially injured, or of a single blade of grass burnt or destroyed. That was the conclusion to which he came upon the question of fact.

It appears to me that, whatever conclusion I myself might have arrived at if the case had come before me in the first instance, I cannot overrule a decision arrived at by the Master of the Rolls with such advantages and such opportunities. Indeed, we were scarcely pressed to overrule that decision *simpliciter*.

But we were pressed with this—that further time has now elapsed

and another year has now gone, and that we might send down a scientific witness, or scientific witnesses, who should go and inspect the property and report to us, either as witnesses or as referees. To my mind that would not be a satisfactory mode of dealing with such a case as this. I am unable to find any question or questions which I could dictate to those witnesses upon which their answers would enable me to determine the case. They would not merely have to ascertain what there is, but what is the cause, and how much of one particular cause operates in combination with other causes ; and, in fact, it would be giving a new trial upon new evidence, based upon the present state of things. Therefore I could not give my voice for any such attempt as that to solve the question between the parties.

In truth, I should be very loth to stop a great work of this kind where there is conflicting evidence between the parties, except upon the verdict of a jury, which jury would have had the opportunity of personally visiting and seeing the *locus in quo* and the surrounding district, and before whom witnesses would give their evidence *vivâ voce* in open court, and with the knowledge that they were giving it to persons who had the opportunity themselves of knowing something of what they were deposing to.

Then the question presented itself whether an issue should be directed to try the question of nuisance. An issue would, however, hardly be a just or proper mode of trying the case. The bill was filed in February last year. An issue as to what was the state of things at the time when the plaintiff invoked the protection of this court could not now be satisfactorily disposed of by a jury. Of this I am satisfied, that if with the experience of the year 1873, if with the experience of the year 1874, and if with the experience of the beginning of the year 1875, the plaintiff is able to make out that there has been a substantial wrong done to him, and that a substantial wrong is continued to be done to him, there is no danger of any mischief for which he will not be able to get ample compensation up to the time of the verdict, whether that is reckoned in scores or hundreds or thousands of pounds. If, as the result of that verdict and of the evidence adduced in that trial, it should then appear to the court that it is a fit case to be followed up by a mandatory injunction, that mandatory injunction would be quite in time to arrest the further progress of mischief. For I am satisfied that if such an injunction were granted in the year 1875, no landscape painter or landscape gardener would, in the year 1876, be able to trace in the woods and forests of this estate the slightest evidence of the peril to which they had been in the meantime exposed.

I think the plaintiff ought to be in the position of a man who has been nonsuited at law for want of sufficient evidence at the time. If

he can make out, with new materials, or with better evidence, a better case to satisfy the court, he is at liberty to do so. The decision of the Master of the Rolls, affirmed by us, will not prejudice the plaintiff any more than by showing that he had not, up to the 22d of February, 1873, sustained sufficient damage to warrant a verdict in an action on the case, or to warrant this court in interfering. Further than that he is not prejudiced, except, of course, that, like every other unsuccessful litigant, he has to pay the costs of his unsuccessful litigation.

I am of opinion that the decree of the Master of the Rolls ought to be affirmed, and that this appeal should be dismissed with costs.

SIR G. MELLISH, L.J. There is no real difficulty as to the principles on which this court should proceed in deciding this case.

The question to be determined is, whether the plaintiff has made out that in an action at law he could recover substantial damages for the nuisance alleged in the bill; and the only real difficulty is in distinguishing how much that proposition depends upon questions of fact, and how much upon questions of law. There is a difficulty in distinguishing precisely what is a question of fact from what is a question of law in these proceedings about nuisances. Indeed, when certain inferences of fact have been established by numerous cases, they become, to a great extent, very nearly of the same authority as if they were propositions of law. For instance, it is not correct to say, as a strict proposition of law, that if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle that, unless substantial damage is proved to have been sustained, this court will not interfere.

These principles apply to the observation which the Master of the Rolls has made as to the damage being visible. That, as a strict proposition of law, is not correct; for if it is by evidence made out that there is substantial damage, it does not matter how the fact of damage is made out, whether by the eye or by the nose, or whether it is made out by the eye of a scientific person, or by the eye of anybody else. But, as a matter of fact, in cases of a nuisance of this particular description, unless the damage is proved to have been sustained,

so that, I will not say every ignorant eye, but every fairly instructed eye can really and clearly see it—unless that is the case, it is impossible to be certain that the substantial damage has actually been sustained. Therefore, those propositions are, to my mind, perfectly accurate, and I do not think that it is material here to distinguish how much of them ought now to be considered as inferences of fact which the court draws from former cases, and how much of them ought to be considered strictly as inferences of law.

On account of the great importance of this case to the parties, and on account of the great contradiction in the evidence, it was not satisfactory to my mind to decide the case without in a great measure going through the evidence. The result is, that I am persuaded that this case was thoroughly investigated in the court below; that is to say, it was as thoroughly investigated as the defective procedure renders it possible that a case of this kind should be investigated. It is quite obvious that the Master of the Rolls, in coming to the conclusion which he did, had very great advantage over us in this court. The witnesses were cross-examined before him. He put numerous questions to them himself, to satisfy his own mind as to the particular points on which he required to be satisfied, and no doubt he obtained that information which he particularly wanted. We have not had that advantage. If such a decision amounted to what in a court of law would be called a verdict against the weight of evidence, we ought to interfere, but I think that great weight must, in cases of this kind, be given to the decision of the court below; and unless we can see plainly that there was a wrong inference drawn on a point of fact, we ought not to interfere with the decision. Having read through all the evidence, I cannot say that on the evidence as it stands I differ from the conclusion that the Master of the Rolls came to. [His Lordship then commented on the evidence, and continued:]—Therefore I have no doubt that it is impossible on this evidence, as it stands, to do anything else than affirm the judgment of the Master of the Rolls.

One question on which I did certainly at the close of the argument entertain a doubt was, whether it was our duty to have this case further investigated, or to affirm the judgment of the Master of the Rolls. Now, it would have been very difficult for us to have sent down any persons, on whose opinion we could satisfactorily have relied, to examine the state of the woods. We should practically, if we had done that, have been giving up our judgment to their judgment, for after having done that, it would have been very difficult for us to differ from what they had said.

Then I considered—and that is what I had more doubt about—

whether it was our duty to order an issue to be tried at Durham. But I have come to the conclusion that that is not our duty. In the first place, the plaintiff at the outset had the choice of the tribunal which he would select. He could have brought his action at law, and have tried it by a jury of the county of Durham, or he could bring his suit in this court. He chose to bring his suit in this court, and in my opinion it is very important for us to see, though of course we must administer equal justice to both parties, that plaintiffs do not get the power of stopping very important commercial works by proceedings in this court when they have not got a case which they could practically present to a jury.

Then it is impossible not to be influenced by this consideration, that an enormous expense has been incurred by the trial in this court, and by bringing up the witnesses to London. The Master of the Rolls has properly come to the conclusion, on the evidence as it stands, that the plaintiff has not made out his case, and has therefore dismissed the bill. Would it be just and right, if that is the state of the evidence on the case as it stands, that we should begin a totally new investigation at an enormous expense to the defendants, who have simply been brought here by the plaintiff, and who can say that it is not their fault that there has been no trial by a jury? It appears to me that it would be unjust to the defendants to order that there should be an issue tried in this suit, particularly when we consider that the case is not finally decided. If real damage is continuously sustained, and is made plain and manifest so that no one who sees the woods can doubt it—if that case does occur—the plaintiff will not be without his remedy. He may still bring his action, and, in my opinion, he may bring his action in time to stop any very real and serious damage to his property.

On the whole, therefore, I am of opinion that the judgment of the Master of the Rolls must be affirmed and the appeal dismissed with costs.

JONES v. CHAPPELL.

IN CHANCERY, BEFORE SIR GEORGE JESSEL, M.R., JULY 13, 1875.

[*Reported in Law Reports, 20 Equity Cases, 539.*]

THE plaintiff was the lessee of two houses in Effingham Street under two leases, dated respectively the 19th of May and the 8th of June, 1863, granted by the trustees of the will of Thomas Cubitt. The rooms in these houses were let out to weekly tenants.

These houses at their back adjoined a piece of vacant land from which they were divided by a low wall, and the windows at the back had, at

the time of the demise and also shortly before the filing of the bill, free access of light and air.¹ The adjacent piece of land had, by a lease dated the 16th of December, 1852, and granted by the said Thomas Cubitt, been demised to James Smith for the term of eighty-five years and three-quarters. The lease contained a covenant by the lessee to keep all future buildings and erections in repair, and also not to erect any steam-engine on the premises, or commit or do anything which might be a nuisance or annoyance to the tenant or occupier of any messuage or premises near to the premises thereby demised.

The bill alleged that the defendant, who was assignee of the lease of the last-mentioned premises by an assignment subsequent to the plaintiff's lease, had lately erected steam-engines and stone saw-mills, and other machinery thereon, and that the noise, steam, and smoke arising from the working of the machinery were a nuisance, and caused great damage to the plaintiff and his under-tenants, and that the nuisance arising from the works had been so great that several of the plaintiff's tenants had left his houses, and the value thereof had been seriously depreciated.

The bill also alleged that the defendant had erected a staging to carry a travelling crane close to the plaintiff's windows, which obstructed the light that formerly came through the back windows of the plaintiff's houses, and was erecting a wall at a distance of only eight feet opposite to the said windows, which obstructed the access of light and air, and rendered the rooms lighted by the back windows nearly uninhabitable.

The plaintiff charged that he was entitled under his leases to enjoy the access of light and air through the said back windows, and that, as the defendant claimed to be entitled to the land at the back of the plaintiff's premises under a lease granted by the plaintiff's lessors, he was not entitled to obstruct the light and air coming to the plaintiff's premises.

The bill prayed that the defendant might be restrained by injunction from sawing any stone or other material, and from working any machinery upon, and from causing any smoke or steam to be emitted from, and from carrying on any works or business upon the land at the back of the plaintiff's houses, so as to cause any damage or annoyance to the plaintiff or his tenants; and (secondly) that the defendant might be restrained from permitting the wall and staging erected by him to remain erected so as to diminish the access of light and air to the windows at the back of the plaintiff's houses.

Mr. Chitty, Q C., and Mr. Jason Smith, for the plaintiff.

¹ A portion of the case dealing with the question of plaintiff's right to light and air, has been omitted from both the statement of facts and the opinion.—ED.

Mr. Southgate, Q.C., and Mr. Macnaghten, for the defendant.

SIR G. JESSEL, M.R. I am satisfied this bill cannot be maintained. First, as regards the lights. The windows are not ancient lights, and as the lease under which the defendant claims is prior in date to the plaintiff's, the plaintiff is precluded from claiming to be entitled to the lights in question under the well-known doctrine on which the bill appears to be founded, namely, that a landlord cannot derogate from his own grant.

But a very ingenious argument was addressed to me, namely, that although in truth the defendant's lease was prior in date to the plaintiff's, still the defendant, by erecting these great buildings on the land, which are manifestly a great improvement in value to the property, is committing waste. Now, in my opinion, that is not proved. As I understand the law, the erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance. I quite agree that it is not mere injury in the sense of value. You may prove an injury in the sense of destroying identity, by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times. In the lease in question, not only is there no covenant restraining the lessee from erecting buildings, but there is a covenant that he will keep all future buildings and erections in repair, showing that the erection of buildings was contemplated. Therefore, so far as the lease goes, it is almost an implied license to erect buildings. But, independently of license, we must consider that if there had been waste at law, the landlord could, before the abolition of the action for waste, have brought an action or obtained an injunction, and that he would be entitled to the latter now if the injury were sufficiently serious. It is plain to my mind, looking at the nature of the works and at what the defendant is doing, that the lessors could neither have done the one formerly, nor could they do the other now. In fact, I am satisfied it is not waste.

With reference to the authorities, the doctrine is so well laid down in *Doe v. Earl of Burlington*,¹ that I do not think I need add anything further to it or to the modern expositions of the law on the subject. Therefore, even if it had been pleaded, I do not think that the plaintiff is entitled to say that, because the defendant has done an act which he could not have done lawfully without the license of the landlord, he is entitled to restrain it by injunction when the landlord has given him license. The argument should be carried a step further, and it should be alleged that the landlord has refused a license, and declined to interfere. But the owner in possession of property erecting a building of this kind does not commit an illegal act towards a stranger because somebody

¹ 5 B. & Ad. 517.

else might or might not have a right to stop it. There is no derivation of title under the same landlord in that sense at all. It does not appear to me that if the landlord had refused license, and there had been an act of waste, there is any compulsion upon the landlord to file a bill for an injunction, the action of waste being abolished, and he not being able now to recover possession of the premises by ejectment. The utmost he could do would be to file a bill for an injunction to restrain the defendant from continuing the building.

Upon those grounds, therefore, it appears to me plain, so far as the substance of the case is concerned, as regards the light and air, that the bill cannot be maintained.

[His Honor then referred to the alleged nuisance arising from the noise occasioned by the defendant's machinery.]

It appeared in evidence, as far as I could gather, that at the time when the bill was filed, but certainly shortly before, the two houses were let to weekly tenants, and they are both still so let and fully occupied. Now, as I understand the doctrine in *Simpson v. Savage*,¹ the landlord in such a case cannot bring an action. The injury is a temporary nuisance, because the saws might be stopped and the steam-engine might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased, or the person committing it may choose to make it cease the moment the estate comes into possession.

Another ground of action on the part of the landlord might be that the existence of a nuisance of a temporary character would render it more difficult for him to let to a future tenant or to sell. But that is said not to be a good ground of action, because the theoretical diminution of the value of the property cannot be taken into account, inasmuch as the purchaser or the new occupier would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson v. Savage*, and that the principles upon which it was decided apply as much to weekly tenancies as to any other tenancies.

But then it is said that, if that is so, no relief at all can be obtained, and Mr. Jason Smith said that there was some doctrine of this court by which a weekly tenant could not have an injunction. So far as I am aware, that has never been decided, but I should not find the slightest difficulty myself, if an occupier, being a weekly tenant, and his landlord were to join in a suit to restrain a nuisance, in granting them an injunction.

I can see no reason why a weekly tenancy may not continue from

¹ 1 C. B. (N. S.) 347.

week to week quite as long as a yearly tenancy from year to year; because it is not a holding for one week, but it is a holding from week to week. I do not accede to the doctrine that a weekly tenant could not have an injunction to stop a nuisance which is injurious to his health and comfort, and prevents his residing in the rooms or house he may occupy. I am not aware of any decision to that effect, and I certainly should not be the first to make one.

[His Honor then referred to the evidence in the case, and dismissed the bill, but, with the defendant's consent, without costs.]

SAMUEL B. CAMPBELL ET AL., RESPONDENTS, *v.* NATHAN N. SEAMAN, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 21, 1876.

[Reported in 63 *New York Reports* 568.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff entered upon the report of a referee.

The action was brought to recover damages resulting from an alleged nuisance, and to restrain the continuance thereof.

The referee found the following facts: "The plaintiffs are the owners of thirty to forty acres of land adjoining the village of Castleton, upon the Hudson River, about six miles below the city of Albany; there are native yellow and white pines upon the said land which grew in the forest, many of the most comely of which have been saved by the plaintiffs as a protection against winds and as an ornament to the grounds. The plaintiffs have caused many of the forest trees to be removed, and have greatly ornamented and improved the said grounds by making gravel roads and walks through the same, and by planting Norway spruce and other ornamental and shade trees, and have erected an elegant dwelling-house upon the said premises, with barns and other out-houses, and therein have laid out large sums of money, and have made thereon a fine garden for grapes, plums, etc.; that said grounds have been graded, terraced, and have been rendered very valuable by the moneys expended thereon by these plaintiffs.

"That defendant, whose lands adjoin the said lands of the said plaintiffs, has for two years or more been manufacturing brick upon his own land and adjoining the plaintiffs' said lands; that in the manufacture of such brick he mixes anthracite coal-dust with the clay and sand in moulding his brick, and in constructing his kiln a portion of the brick are left out and the space filled with the anthracite coal-

dust ; this is done in the outer portions of the kiln, and the object obtained is: this coal-dust, when the kiln becomes heated, takes fire and gives sufficient heat to burn the brick to the outer layers. The burning of the kiln under this process causes a sulphurous acid gas, for at least the last two days of the burning, to escape from the kiln, which is very poisonous and injurious to persons who inhale it, and is very destructive to many kinds of vegetation. The evidence in the case shows that this gas from the defendant's kiln has on several occasions killed the foliage on the plaintiffs' white and yellow pines, their Norway spruce; and has, after repeated attacks, killed and destroyed from 100 to 150 of their valuable pine and Norway spruce trees, and has injured their grape vines and plum trees. The evidence is very conclusive as to the destructive qualities of this sulphurous acid gas to the pine and Norway spruce trees, and to grape vines and plum trees. The plaintiffs have already suffered considerable damage from the defendant burning brick at his kiln, and if continued they must inevitably continue to suffer and their property be greatly depreciated in value."

The referee also found that, "on the premises of the defendant where he has and does manufacture brick, as mentioned in the pleadings and evidence in this cause, the same have been known and used as a brick-yard for over twenty-five years; and at the time the plaintiffs improved and beautified their property they knew that the property of the defendant had been previously applied to such use, and that in such use and manufacture of brick anthracite coal and coal-dust was used and employed. Near to the premises of the plaintiffs one Philip H. Smith has a brick-yard, and has employed the same in the manufacture of brick by the use of anthracite coal in the same manner as the defendant has done for the period of five years; and the Hudson River Railroad Company, whose road runs in front of the plaintiffs' premises, and near to their fruit and ornamental trees, have on the average, for more than four years past, run on said road and by said premises of the plaintiffs, daily, at least twenty-seven trains of cars propelled by locomotives burning and using the same description of coal as the defendant. That the burning of brick on the premises of the defendant by the use of anthracite coal-dust does not affect the premises of the plaintiffs injuriously, except in case of a southerly wind at the time of burning ; and such injuries have happened only at times, and not continually, while defendant has occupied said premises. That anthracite coal, in the manner used by the defendant, has been employed in England for more than half a century, and for nearly the same period of time in the United States, and is now generally used by all manufacturers of brick in the State of New York

and elsewhere. That by the use of anthracite coal in the manufacture of brick a much larger quantity of good hard brick is produced, and at much less expense, than by burning kilns of brick exclusively with wood; and brick cannot be successfully manufactured for market by the use of wood alone and compete in market with those who use anthracite coal in the manufacture. That the prohibition of the use of coal by the defendant in the manufacture of brick upon his premises is of great damage to the defendant, and substantially destroys the value of the defendant's property as a brick-yard; that as a brick-yard, employed in the manufacture of brick by the common and ordinary process with the use of mineral coals, it is very valuable and capable of producing from 3,000,000 to 4,000,000 of brick annually, at good profit to the defendant."

The referee found, as conclusions of law, that plaintiffs were entitled to recover the damage proved to have been sustained, and to an injunction restraining defendant from burning brick at the place named by the process above described.

Geo. W. Miller and W. S. Hevenor for the appellant.

G. P. Jenks for the respondents.

EARL, J. The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson River, and had owned it since about 1849. During the years 1857, 1858, and 1859 they built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at \$500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiffs' land only when the wind was from the south.

But the claim is made that although the brick-burning in this case

is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined.¹

Prior to Lord Eldon's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal.² Here the remedy at law was not adequate. The mischief was substantial, and, within the principle laid down in the cases above cited and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a

¹ Only so much of the opinion is given as relates to this question.—ED.

² *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *Reid v. Gifford, Hopkins' Ch.* 416; *Pollitt v. Long*, 58 Barb. 20; *Mohawk and Hudson R.R. Co. v. Artcher*, 6 Paige 83; *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black (U. S.) 545, 551; *Webber v. Gage*, 37 N. H. 182; *Dent v. Auction Mart Association*, 35 L. J. (Ch.) 555; *Attorney-General v. United Kingdom Tel. Co.*, 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165; *Clowes v. Staffordshire Potteries Co.*, L. R. 8 Ch. App. 125.

flower or a vine as well as an oak.¹ These damages are irreparable too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health. ¹

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit.

The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained.²

It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses.³ One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land any thing which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.

It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they bought their lands, knew that any one intended to burn any bricks upon the land now owned by defendant. From about 1840 to 1853 no bricks were burned there.

¹ Cook v. Forbes, L. R. 5 Eq. Ca. 166; Broadbent v. Imperial Gas Co., 7 DeG., McN. & G. 436.

² Ross v. Butler, 19 N. J. 294; Meigs v. Lister, 23 N. J. Eq. R. 200; Clowes v. North Staffordshire Potteries Co., *supra*; Mulligan v. Eliot, 12 Abb. Pr. R. (N. S.) 259.

³ Taylor v. The People, 6 Parker Cr. 352; Wier's Appeal, 74 Penn. 230; Brady v. Weeks, 3 Barb. 156; Barnwell v. Brooks, 1 Law Times (N. S.) 454.

Then from 1853 to 1857 bricks were burned there, and then not again until 1867. From 1857 to 1867 the brick yard was plowed and used for agricultural purposes. Before suit brought, plaintiffs objected to the brick-burning. No act or omission of theirs induced the defendant to incur large expenses or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case.

It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures either by suit at law or in equity to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief. But this is not such a case.¹

The defendant claims a prescriptive right to burn bricks upon his land and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire by lapse of time and continuous user the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for twenty consecutive years. Anthracite coal was first used for burning bricks in this yard in 1834, and after six years brick-burning was discontinued. It was not resumed again until about 1853, and after four years it was again discontinued, and it was not resumed again until 1867. So that anthracite coal, which caused plaintiffs' damage, had not been used in all for twenty years and certainly not continuously in burning bricks upon the yard now owned by defendant. If he could acquire the right claimed by prescription, he, and those under whom he holds, must for twenty years have caused the poisonous gases to flow over plaintiffs' land whenever they burned bricks and the wind blew from the direction of the kiln. Such a prescription neither the allegations in the answer nor the proofs upon the trial, nor the findings of the referee, warrant. The referee finds that the premises of defendant have been known and used as a brick-yard for over twenty-five years. This is not a finding that they have been used as a brick-yard for twenty-five years continuously, or that they have caused the poisonous gases to flow over plaintiffs' land for that length of time continuously.²

Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large

¹ Radenhurst *v.* Coate, 6 Grant's Ch. (Ont.) 140; Heenan *v.* Dewar, 18 Id. 438; Bankart *v.* Houghton, 27 Beav. 425.

² Ball *v.* Ray, L. R. 3 Ch. App. 467; Parker *v.* Mitchell, 11 Ad. & El. 788; Battishill *v.* Reed, 18 C. B. 696; Bradley Fish Co. *v.* Dudley, 37 Conn. 136.

in case he be restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick-making exists in all parts of our State, and particularly at various points along the Hudson River. An injunction need not therefore destroy defendant's business or interfere materially with the useful and necessary trade of brick-making. It does not appear how valuable defendant's land is for a brick-yard, nor how expensive are his erections for brick-making. I think we may infer that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiffs' damages from its continuance. Hence this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.

We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick-making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly-settled community.

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.

FLETCHER *v.* BEALEY.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,
JANUARY 27, 1885.

[*Reported in Law Reports, 28 Chancery Division, 688.*]

THE plaintiff was a paper manufacturer, at the Kearsley Mills, situate on the bank of the river Irwell, a few miles from Manchester. For the purposes of his manufacture he used a large quantity of water, which was pumped from the river and filtered by means of filter-beds on his premises, and, after being used for washing and other purposes, was returned to the river.

The defendants were alkali manufacturers, their works being situate

about six miles higher up the river than the plaintiff's mills. In the process of their manufacture a large quantity, amounting to many thousands of tons in the course of a year, of a refuse substance, known as "vat waste," was produced. The defendants had recently agreed with the Lancashire and Yorkshire Railway Company to rent from them a piece of land, comprising about three and a half acres, for the purpose of depositing on it their "vat waste." The agreement was terminable by either party by a twelvemonth's notice given at any time. The piece of land was situate on the bank of the river, about a mile and a half higher up than the plaintiff's mills, and it lay between the river and the bank and retaining wall of a canal which belonged to the company. The defendants brought the "vat waste" from their works along the canal in barges, and then tipped it over the canal bank on to the land. The bank of the canal at this point was ninety-six feet higher than the river, and the land sloped from the canal bank towards the river. The surface of the land was a loamy gravel, lying on a stratum of clay about fourteen feet thick, the clay in its turn lying on a stratum of rock, the slope of which was towards the river.

The plaintiff by his writ claimed an injunction to restrain the defendants from sending "vat waste," or refuse, or other matter whatsoever, from their chemical works, or otherwise, into the river, or on to the ground adjacent thereto, or in any way so as to pollute the water to his injury.

The evidence showed that when a heap of "vat waste" had been deposited there would after a time flow from it a greenish liquid of a very noxious character. This liquid might not flow from the heap immediately after it had been deposited, but it was certain to do so in the course of time, and it might continue to flow from the heap for a period of forty years or even longer. It was admitted that if this liquid was present in the water in any appreciable quantity it would render it entirely unfit for use in the plaintiff's manufacture. The liquid could not be got rid of from the water by filtration. The plaintiff said that the result would be utterly to destroy his trade, in which and in the works connected with it he had invested more than £100,000. He did not allege that any injury had yet been done to him, but he said that, when the liquid began to flow from the defendants' heap, it must almost certainly flow into the river, and, moreover, that, as the defendants were depositing the waste on the land at the rate of 1,000 tons a month, they would in ten years' time have deposited on the land as much of the waste as could be placed there, and that they would then probably give up their tenancy of the land, and there would be no one responsible for the proper management of

the heap, which would remain, and the plaintiff would be in greater peril of injury even than during the defendants' tenancy. The plaintiff also alleged that, from the nature of the ground, the bank of the river was very liable to slip into the water, and that if it did so, it would carry the heap with it. The plaintiff also alleged that the retaining wall of the canal bank was very liable to give way ; that it had already on several occasions done so, and that, if it should give way at the point where it abutted on the piece of land, it would carry the defendants' heap into the river.

The defendants said that they intended so to manage their heap by means of proper drainage and otherwise, that no appreciable quantity of the liquid which flowed from it should flow into the river. They said that they were about to build a proper retaining wall to prevent the bank of the river from slipping, and that the risk of the retaining wall of the canal giving way was very small.

This was the trial of the action. The effect of the evidence is more fully stated in the judgment.

Cozens-Hardy, Q.C., and L. Ryland for the plaintiff.

Higgins, Q.C., and Stirling for the defendants.

January 27, 1885.

PEARSON, J. The plaintiff complains that the defendants are placing upon a piece of land on the bank of the river Irwell, higher up the river than his works, a large mass of a substance called "vat waste," the existence of which in that particular spot will, he says, imperil his trade. He has carried on business for many years at the Kearsley Paper Mills, which are situated upon the bank of the river Irwell. The defendants are alkali manufacturers, their works being on the same river, about six miles higher up the stream. The plaintiff is a manufacturer of papers of a peculiar description. He says, in one of his affidavits, "I have for many years past especially excelled in trade in the production of the very finest classes of paper which are made in England, such as cigarette paper, the finer kinds of copying papers, and fine and delicate tissues of all kinds. For the purposes of my works I use in the making of paper very high class waste and linen, and in the first processes this has to be bleached, after being boiled and beaten up, to as pure a white as it is possible to get, and this is the secret of my success in trade, that I have, by long experience and care in the use of water and chemicals, succeeded in getting a great purity of white to start the process of paper-making. Unless I am able to get this pure white for what is known in the trade as bottom, no amount of washing or use of chemicals in the later processes will enable me to get the delicacy of color shown

in some of the sample-books now produced, and if, in order to get rid of deleterious matter, I have to use too much chemicals in the later processes of washing, it quite spoils the paper by rendering the fibre too tender." The defendants, as I have said, are alkali manufacturers. In the process of manufacturing alkali, a very large quantity is produced of a refuse which is denominated "vat waste." It contains a considerable amount of sulphur, and is hot, and when heaped up it gets, as I conclude, hotter, and unless great care is taken it will ignite, and if a large heap of this "vat waste" should ignite, the result, as one of the witnesses told me, would be to suffocate all the people in the neighborhood. It is, therefore, a very dangerous material, and the alkali manufacturers are obliged to be exceedingly careful in the handling of it, and, after a large heap of it, the product possibly of many years, has been stored, there flows from it a liquid of a greenish color, which contains very destructive chemical elements. The defendants for some years got rid of this refuse by carting it bodily into the river Irwell, but, I think in the year 1881, they were restrained by injunction at the suit of the Salford corporation from continuing that process, and, not having any land in the immediate neighborhood of their works which is suitable for storing this refuse, they have taken for the purpose, from the Lancashire and Yorkshire Railway Company, a piece of land comprising three and a half acres, adjoining the Bolton, Bury, and Manchester Canal, which belongs to that company, at Nob End Wharf, which is on the bank of the river, and one mile and 740 yards above the plaintiff's works. The plaintiff says that if the defendants proceed to deposit this refuse on this land, depositing, as they do at the present moment, at the rate of 1,000 tons a month, the result will be that, sooner or later, there will necessarily come from the heap a large quantity of this green liquid, which will find its way into the river Irwell, and, finding its way into the river, it will be carried down to his works, and when he pumps the water from the river he will take in with it this chemical matter which will be destructive to his paper. There is no dispute between the parties that in process of time a liquid of that character does come from these heaps. There is no dispute that if any reasonably large quantity of that liquid should find its way into the plaintiff's bleaching works, that is, if it should be pumped by him from the river into his reservoir, it would be very destructive to his manufacture. But the defendants say: " You need be under no apprehension. We have not the slightest intention of injuring you; we intend to conduct our works in such a way that no appreciable quantity of that liquid shall find its way into the Irwell, and consequently no appreciable quantity will find its way from our heap into your works."

The hearing of this case was commenced in August last ; it was continued in December; and neither in August nor in December was there any allegation that the plaintiff had, in fact, received any injury from the defendants' operations. It is admitted that the action is brought, not to obtain damages for a past injury, but to prevent that which is feared as a future injury, or, to use the more technical expression, the action is a *quia timet* action.

That being so, the objection has been taken that, under the particular circumstances of this case, a *quia timet* action will not lie, and, as that seems to me to be really the only point in the case, I think that I had better consider, first, what are the rules which have been laid down with regard to *quia timet* actions, and then I will consider whether the evidence in this case brings it within those circumstances which have been held to justify such an action. I need not refer to many of the cases which have been cited, because there is really no dispute as to the law.

The first case I will mention is Earl of Ripon *v.* Hobart.¹ In that case the parliamentary commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, asked for an injunction against the defendants, who were the trustees for draining another district, and who were commencing to erect a steam-engine for pumping water from the fens into the river Witham, substituting a steam engine for the power which they had previously obtained by windmills, which had up to that time been used for the purpose. It was said that the steam engine intended to be employed would be equivalent in power to twenty-seven windmills, and that the effect of using a steam engine of that power would be to pump so much water into the navigation as to overpower it altogether. Lord Brougham, L.C., said:² "If, indeed, this be a work which not only gives the power of doing mischief, but cannot be used, or can hardly, in the common course of things, be used without working mischief; if, in short, it be a thing which can scarcely be used without being abused, the case comes to be very different. For, in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases

¹ 3 My. & K. 169.

² 3 My. & K. 176.

where the mischief, should it be done, would be vast and overwhelming. Accordingly, if it appeared that the works in question could hardly be used without damage to the inferior districts, I might hold that erecting them was, in itself, a beginning of injury, though there might be a possibility of otherwise using them; and, if the damage, should it happen at all, were the destruction of the navigation, and the subjecting of the lower districts to a deluge, I might scrutinize less narrowly the probability of the engines being injuriously worked."

In Attorney-General *v.* Corporation of Kingston,¹ an information had been filed against the corporation of Kingston, because they were proceeding to pour a large quantity of sewage into the river Thames. They were connecting their own system of drainage with a new main sewer, in such a way as greatly to enlarge the quantity of sewage coming into the river Thames. After discussing the Acts of Parliament under which the corporation had power to do this, and concluding that, if they did create a nuisance, they were not justified by the Acts under which they were incorporated, Wood, V.C., said:² "It remained then to be considered whether there was evidence of an actual nuisance committed, or evidence of the extreme probability of a nuisance, if that which was being done was allowed to continue. The difficulty in the way of the plaintiffs was that it was necessary for them to establish the existence of an actual immediate nuisance, and not a mere *qua timet* case of injury a hundred years hence, when chemical contrivances might have been discovered for preventing the evil."

Again, in Salvin *v.* North Brancepeth Coal Company,³ which was a case of alleged injury to trees and grounds generally by fumes from a chemical factory, and which both Jessel, M.R., and the Court of Appeal considered was not made out by the evidence, Mellish, L.J., said:⁴ "The question to be determined is, whether the plaintiff has made out that in an action at law he could recover substantial damages for the nuisance alleged in the bill; and the only real difficulty is in distinguishing how much that proposition depends upon questions of fact, and how much upon questions of law. There is a difficulty in distinguishing precisely what is a question of fact from what is a question of law in these proceedings about nuisances. Indeed, when certain inferences of fact have been established by numerous cases, they become, to a great extent, very nearly of the same authority as if they were propositions of law. For instance, it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved

¹ 13 W. R. 888.

² Ibid. 891.

³ Law Rep. 9 Ch. 705.

⁴ Ibid. 712.

that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this court will not interfere." I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action.

Now the circumstances of the present case are these. In the first place, it is said that, do what the defendants may, if they proceed to cover, as they propose to do, two acres and a half of the land with this refuse, at the rate of 1,000 tons a month, necessarily, although not immediately, there will ooze from the heap a large quantity of this pernicious liquid. Moreover, it is said that, inasmuch as the defendants have taken a lease of the land from the railway company only for the purpose of depositing this refuse on it, and they have the power of giving up the lease when they have made as much use of the land as they can for the purpose, at the end of ten years, at which time it is reasonably concluded they will have deposited on the land as much of the refuse as it will hold, they will give up the lease, and then the heap will be left without any person whose duty it is to take care of it, and the liquid will continue to ooze out of it for a period of forty or fifty years, or even longer, and the plaintiff will be under a risk, an increasing risk, certainly a much greater risk than he incurs at the present moment, of having the water of the Irwell polluted, and of pumping into his works the water which is so polluted. The quantity of water which the plaintiff takes from the Irwell is very large indeed, amounting, I think, sometimes to one-third of the water in the river; 1,000,000 gallons in the twenty-four hours.

Now, if that stood alone, would there be a sufficient ground for a *quia timet* action? I think not. There was some conflict in the evidence as to what amount of the liquid would be sufficient to pollute the water so as to injure the plaintiff. According to the evidence of the plaintiff, one gallon in 10,000 would be sufficient to produce injury, and it is also in evidence that, if at the end of ten years there were 120,000 tons of the refuse deposited on the land, there would not be less of the liquid oozing from the heap and capable of getting into the Irwell than one gallon in a little more than 5,000, and of course, if one gallon in 10,000 would be injurious, one gallon in 5,000 would be highly injurious. But the answer of the defendants is this. They do not intend that any appreciable amount of this liquid should get into the Irwell, and, inasmuch as it is perfectly practicable, according to all that we know, to prevent the liquid which comes from the heap from getting into the Irwell, I cannot think that at the present moment the evidence on this point is sufficient to justify the court in interfering. In *Attorney-General v. Corporation of Kingston*,¹ Wood, V.C., spoke of injurious results at the end of 100 years. If an injury does result in the present case it will result in a much shorter time, and, if the heap were left alone without any protection to the river to prevent the liquid from oozing into it, I have no doubt that at the end of ten years the water would be polluted sufficiently to do a great amount of injury to the plaintiff. But Wood, V.C., pointed out that in 100 years' time chemical processes might be invented which would prevent the sewage from doing any injury to the river Thames, and I think that in ten years time it is highly probable that science (which is now at work on the subject) may have discovered some means for rendering this green liquid innocuous. But, even if no such discovery should be made in that time, I cannot help seeing that there are contrivances, such as tanks and pumps, and other things of that kind, by which the liquid may, as the defendants say, be kept out of the river altogether. Therefore, upon that ground alone, I do not think that the action can be supported.

There is another observation to be made on this point of the case. In the first place I think the danger is not imminent, because it must be some years before any such quantity of the liquid will be found issuing from the heap as would pollute the Irwell to the detriment of the plaintiff. And, in the next place, if any such quantity of the liquid did get into the river so as to injure the plaintiff, I think it would be discovered immediately, and it would be perfectly possible for him then to apply to the court for relief, and to obtain an im-

¹ 13 W. R. 888.

mediate injunction restraining the defendants from allowing the liquid to get into the river. For both these reasons I think there is not sufficient in this part of the case to sustain a *quia timet* action.

The next point raised on behalf of the plaintiff was this: It was said, and with force and truth, that the piece of land upon which the defendants are depositing their refuse is not level, but is on a considerable slope from the wall of the canal down to the river Irwell. The soil is at the surface loamy gravel; under that is clay, and under that rock. There is very conflicting evidence as to how far there have been slips already, and what probability there is of the land continuing to slip. It was stated by some of the witnesses that the land is full of water. In my opinion the only evidence on which I can rely points to there being one spring of water; of that I think there can be no doubt. There is a spring from which water comes close to the bottom of the tip as it at present stands; it is not yet covered by the heap, but it will be in process of time if the heap is extended, as it seems probable that it will be, and if this water, or any portion of it in the neighborhood, should get between the clay and the rock, the clay will probably slip and bring everything down with it more or less. It is said that there is so much danger of the heap of refuse being brought down by the shifting and slippery nature of the ground on which it is being deposited, and, if it does come down, of its going bodily into the river, that I ought on this ground alone to grant an injunction. There is another piece of evidence in support of the plaintiff's case which I have not overlooked. A little further to the east, not immediately adjoining the piece of land which the defendants have leased from the company, but a little beyond it, are some mills called the Cream Paper Mills, and the evidence of one of the witnesses was as distinct as could be that the tanks which have been made there are perpetually crushing in, and, according to his statement, the land has been slipping for years. On the other hand, with regard to this particular piece of land on which the defendants' refuse is being tipped, I cannot find from the evidence that any change whatever has taken place at the margin of the river. On the contrary, I am satisfied upon the evidence that there has been no slip of this piece of land such as to alter the contour of the river at that particular spot.

I desire to make two observations upon this evidence. The first is, that, whatever may be the condition of the land in the immediate neighborhood, I am not satisfied that any slip whatever, or, at all events, any slip of any magnitude, has taken place on this particular piece of land. And, in the next place, I can hardly think, looking at all the evidence, that, if any slip should take place, there would be im-

mediately a slip of such magnitude as, according to the fears of the plaintiff, would bring the whole heap of refuse at once bodily into the river. I think that, if any slip does take place, there will be some premonitory symptoms which will warn the plaintiff and the defendants, and give the defendants time to do whatever may be necessary to prevent the heap from slipping into the river, and at the same time enable the plaintiff, if he should think it right to do so, to bring an action against the defendants on the ground of positive and imminent danger at that time. Moreover, the defendants say that they propose to do that which their own engineer suggested was necessary, viz., to build a retaining wall along the bank of the river to prevent any slip of the ground. The soil along the bank of the river consists of about fourteen feet of clay over rock. At the bottom of the fourteen feet of clay, which is good puddling clay, you come to the rock, and they propose to build a retaining wall along the margin of the river, which the engineer says will be sufficient to prevent any slip. The evidence on this point was most conflicting, the scientific witnesses on the one side declaring that it was perfectly certain that the land would slip, and that the whole heap would before long be brought down bodily into the river, while the scientific witnesses on the other side were equally confident that the land would never slip, and never had slipped. Under these circumstances I cannot say that any case of such imminent danger on this ground has been made out as would entitle me to interfere.

I would also add that, supposing a slip to take place, supposing that to happen which the plaintiff fears, viz., that the heap is brought down into the river, if it should be a large heap, and it should all come bodily into the river, I imagine the result would be to choke the river and to create a deluge upon the adjoining lands, and in that event the plaintiff, being one mile and 740 yards lower down, would get ample notice of it long before the water came to him. He would be able to stop pumping, and the damage which would be done to him would be the loss of the power of working for a certain time, a loss which, I need hardly say, would be easily compensated by money.

The third point taken for the plaintiff is a very curious one, viz., that the wall of the canal is very likely to come down, and, if it falls, it will bring the heap with it, and it will all go bodily into the river. Now the railway company, who are the owners of the canal, seem, so far as I can judge from the evidence, to have had a great deal of trouble with this wall. The wall, as I gather, has fallen at least three times, once a great many years ago, and twice more recently. It fell, I think, in 1876, and it fell again curiously enough confirming the

predictions of the plaintiff's witnesses, between the month of August, when the trial of this action was commenced, and the month of December, when the hearing was resumed. In August the defendants' witnesses magnified the beauty and excellence of this wall, and said that it had been built with the greatest possible care at an expense of £20,000, and that it would stand as long as the world lasted. But, notwithstanding, in the month of October, another fall occurred. I think, however, that that fall arose from a temporary accident or blunder. Some alterations were being made in the bank of the canal, and the water was carelessly allowed to get on to the newly-made ground, between the canal and a part of the wall, so as to soak all the new earth, and that, pressing with an enormous weight upon a portion of the new wall, broke it, and carried the *débris* right across the river. This is the same part of the wall which broke on a former occasion, and it is said that the wall immediately behind the heap, and from which the refuse is tipped over, is in a dangerous condition, and is likely, or, as the plaintiff would say, is certain to break, as the other part of the wall did, and, if it breaks, the result will be that the heap must be carried into the river. I do not know how I am to arrive at any conclusion as to the certainty of the wall breaking. It may or it may not break, and, even if it does break, it may break in such a way as not seriously to move the heap, and I think I may fairly take this into account, that the wall belongs, not to the defendants, but to the railway company, and is put there for the support and maintenance of the canal which the railway company are bound to maintain. It has been built with the greatest care, and they have spent a large sum of money upon it. It is their interest to keep the wall in as good a condition as possible, because, if that should happen which the plaintiff fears and predicts, the railway company, as I understand, would have no choice, but would be obliged to replace the wall at any expense. They are bound to keep up the canal, and, if they are careless about the wall, they will put themselves to a most serious loss.

Now, under these circumstances, am I to consider that there is an imminent danger to the plaintiff, or one which will produce irreparable mischief to him, if it should happen? I am unable to say on the evidence before me that the danger is imminent, because it does not follow that the wall, which has broken twice in a different place, will on the next occasion by a freak of fortune break immediately behind the heap. Nor does it follow that, even if it does break there, it will break to such an extent and in such a way as to carry the heap bodily into the river, for, even on the occasion when it broke, not from what I may call natural causes, but from a blunder, or mismanagement of the canal, a large proportion of the wall was left standing for some

distance above the ground, and, if the wall should be left standing for a considerable distance above the ground behind the heap, it does not at all follow that all the mischief which the plaintiff anticipates would occur. I cannot, therefore, in the present state of things say that the danger on this ground is so imminent as to justify me in granting relief in a *quia timet* action.

I think the plaintiff has been premature in bringing his action, and that, according to the rules which have been laid down (and I cannot go beyond precedent), I must refuse to grant an injunction, and I believe, according to the practice in these cases, I have no choice but to dismiss the action with costs. But I observe that in *Attorney-General v. Corporation of Kingston*,¹ Wood, V.C., guarded the dismissal of the information by a declaration of the right of the plaintiff to bring another action thereafter if there should be actual damage, or damage which he could prove to be imminent or likely to be irreparable. The Vice-Chancellor said :² "The proper course would be to dismiss the information, such dismissal being prefaced by a declaration that the court was of opinion that the evidence did not establish the existence of any nuisance in respect of the works executed, or intended to be executed, by the defendants, or any case for the interference of the court in respect of nuisance to be apprehended, if such works were carried into effect. The order would be without prejudice to any future proceedings on the part of the Attorney-General in case the works should occasion a nuisance." Though I do not think it is necessary, yet, if the plaintiff's counsel desire it, I have no objection to inserting a similar declaration in the order which I am now making.

Cozens-Hardy said that he wished to have the declaration inserted.

LAWRENCE J. CALLANAN ET AL., RESPONDENTS, *v.* GEORGE F. GILMAN, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 29, 1887.

[Reported in 107 *New York Reports* 360.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 18, 1885, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.³

This action was brought to restrain defendant from obstructing the sidewalk in front of his store in Vesey Street, New York City.

The material facts are stated in the opinion.

¹ 13 W. R. 888.

² 13 W. R. 892.

³ Reported below, 20 J. & S. 112.

Henry Schmitt for appellant.

John E. Parsons and *Edwin M. Wight* for respondents.

EARL, J. The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

In *Rex v. Russell*,¹ where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said "that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." In *Rex v. Cross*,² the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable-yard. . . . A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to

¹ 6 East 420.

² 3 Camp. 224.

stand while waiting between one journey and the commencement of another." In *Rex v. Jones*,¹ the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber yard, and if the street be too narrow he must move to a more convenient place for carrying on his business." In *Commonwealth v. Passmore*,² the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: "It is true necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. . . . I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street because it saves the expense of storage. But there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business." In *The People v. Cunningham*,³ the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said:

¹ 3 Camp. 230.

² 1 S. & R. 217.

³ 1 Denio 524.

"The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in Russell's Case.¹ 'They must either enlarge their premises or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest of the community." In Welsh *v.* Wilson,² a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk." In Mathews *v.* Kelsey,³ the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."

Now what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers having stores near to each other on the south side of Vesey Street in the city of New York; and a large portion of the plaintiffs' customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk and then a bridge made of two skids planked over so as to make a plank-way three feet wide and fifteen feet long, with side pieces three and one-half inches high, was placed over the sidewalk with one end resting upon the stoop of the defendant's store and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated

¹ Above cited.

² 101 N. Y. 254.

³ 58 Me. 56.

above the sidewalk at the inner end about twelve inches and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometime remained in position when in use one hour, one hour and a half, and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of nine o'clock A.M., and five P.M., and that it obstructed the sidewalk the greater part of every business day. Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more and even less than it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing, and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place or enlarge his premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no one time obstructing the street for any considerable length of time. But there is no authority and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was, therefore, guilty of a public nuisance.

But the defendant claims that the plaintiffs did not allege in their complaint nor prove such special damage as entitled them to maintain this action. It is the undoubted law that the plaintiffs could not maintain this action without alleging and proving that they sustained special damage from the nuisance, different from that sustained by the general public; in other words, that the damage they sustained was not common to all the public living or doing business in Vesey Street and having occasion to use the same.

The plaintiffs did not demand any damages in their complaint, and none were awarded to them by the judgment. They simply demanded an injunction restraining the nuisance, and such was the judgment given to them. The complaint sufficiently alleges the special damages. It sets forth the location of the stores of the parties on the same side of the street, near to each other, the character of the bridge, which, when in use by the defendant, was only thirty-five feet from plaintiffs' store, and the manner and extent of the obstruction upon the sidewalk. From these facts alone, as they are fully set forth, it clearly appears that the plaintiffs suffered damage from the nuisance, which was not common to other persons having occasion to use the street. But the complaint goes still further, and distinctly alleges that the obstruction prevents "the plaintiffs and their employes or patrons and all persons from passing along said sidewalk to and from Church Street, and to and from plaintiffs' said store, to the detriment and great injury of plaintiffs and their said business"; that the obstruction had been maintained for more than six months prior to the commencement of the action, on an average of five hours each day during the business hours of the day, "to the great and irreparable injury of the plaintiffs." While the complaint is not very definite as to the particular damage suffered by the plaintiffs and the extent thereof, there is enough to show that they suffered some special damage; and if the defendant was not satisfied with the complaint in these respects, he should have moved to make it more definite, or for a bill of particulars. The defendant having taken issue upon the complaint, and gone to trial, it must be held sufficient to warrant the proof given.

The facts proved and found show special damage from the nuisance to the plaintiffs. There was some proof that some custom was turned from the plaintiffs' store on account of the obstruction, and that pedestrians were turned to the north side of the street before reaching plaintiffs' store. That the plaintiffs suffered some special damage not common to persons merely using the street for passage is too obvious for reasonable dispute. Direct proof of the damage was not needed. All the circumstances show it.¹

But the judgment rendered is too broad and general in its terms. It is as follows: "That plaintiffs are entitled to an injunction perpetually restraining the defendant, his agents, servants, or employes, from obstructing the southerly sidewalk of Vesey Street, in front of the premises Nos. 35 and 37 Vesey Street, by any plank-way or bridge or other like obstruction, elevated above the sidewalk, and reaching

¹ A portion of the opinion discussing questions of evidence and practice has been omitted.—ED.

from said store, or from the stoop in front of said store to the roadway of said Vesey Street, or from hindering or preventing the plaintiffs or their employes, servants, and customers from having the free and unobstructed use of and passage along the sidewalk of said Vesey Street in front of said premises, Nos. 35 and 37 Vesey Street, by any like obstruction." The judgment entirely prevents the defendant from using the bridge or other like obstruction. We find nothing in the evidence which justifies this. We cannot perceive that the bridge is in any material degree a greater obstruction than skids would be if similarly used. The judgment should be so modified as to read as follows: "It is ordered and adjudged that the defendant, his agents, servants, and employes refrain from unnecessarily or unreasonably obstructing the southerly sidewalk of Vesey Street in front of the premises Nos. 35 and 37 Vesey Street, by any plank-way or bridge or other like obstruction elevated above the sidewalk and reaching from said premises or from the stoop in front of the same to the roadway of said Vesey Street, or from unnecessarily or unreasonably hindering or preventing the plaintiffs or their employes, servants, and customers from having the convenient use of and passage along the sidewalk of said Vesey Street in front of said premises Nos. 35 and 37 Vesey Street, by any like obstruction; and it is further adjudged that the plaintiffs recover of the defendant \$164.20 costs of this action"; and, as so modified, it should be affirmed, without costs to either party in this court.

It is difficult to frame the judgment by the use of general language so as to protect and secure the rights of the parties. But the rules we have laid down in this opinion will probably be found sufficient as a guide if it should be necessary to enforce the judgment as modified, and therefrom the meaning and scope of the important words "unnecessarily" and "unreasonably" may, with sufficient accuracy be ascertained.

All concur.

Judgment accordingly.

PATRICK P. SHERRY AND OTHERS *v.* CHARLES E. PERKINS AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 19,
1888.

[Reported in 147 Massachusetts Reports 212.]

BILL IN EQUITY, filed April 20, 1887, alleging that the first-named plaintiff was engaged in the business of manufacturing boots and shoes in Lynn, and that he had admitted the other plaintiffs, who

were in his employment as operatives, to share in the profits of the business; that there was a voluntary association in Lynn called the Lasters' Protective Union, composed of persons engaged in lasting boots and shoes, of which the first-named defendant was the president, and the other defendant, Charles H. Leach, was the secretary; that on January 5, 1887, Leach, acting for himself and Perkins, called upon Sherry to inquire as to the wages of his lasters, and was told that such wages were to be fixed by the lasters; that on January 8, 1887, certain lasters left the plaintiffs' employment, giving as a reason therefor that they did not dare to work for them further on account of the defendants; that, in order to intimidate others from taking their places and to prevent such lasters from re-engaging in their employment, the defendants, on January 8, 1887, with the assent of the association and out of its moneys, caused to be carried in front of Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U."

The bill further alleged, that, because of such banners, crowds of people gathered in front of the factory when the lasters left their work; that the lasters were injured and threatened with bodily harm if they continued in the plaintiffs' employment; that various lasters, whose names were given, were subsequently called upon by the defendants, and so intimidated and injured that one of them was confined to his house and another left the plaintiffs' employment; that the banner and the acts of the defendants were part of a scheme to prevent persons from entering the plaintiffs' employment, and that the banner was carried in front of the factory until March 22, 1887, when the defendants, with a like purpose and at a time when there was no strike in the factory or trouble with the operatives, caused another banner to be carried in like manner before the factory, with the following inscription: "Lasters on a strike and lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U."

The bill also alleged that Sherry had remonstrated with the defendants without effect; that the business carried on by the plaintiffs was a large one, and that the good-will was of considerable value, both of which, if the defendants were permitted to continue, would be seriously injured and destroyed.

The prayer of the bill was, that the defendants might be restrained from making such banners, and from causing them to be similarly carried, and for further relief.

Hearing before C. Allen, J., who found as facts, that members of the Lasters' Protective Union entered into a scheme, by threats and

intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters; that the defendants participated in this scheme; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing; and that the plaintiffs have been and are injured in their business and property thereby; and the judge reported the case for the consideration of the full court.

J. R. Baldwin for the defendants.

R. Lund & F. Hurlburt (*T. M. Osborne* with them) for the plaintiffs.

W. ALLEN, J. The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs from continuing in such employment, and to prevent others from entering into such employment; that the banners with their inscriptions were used by the defendants as part of the scheme; and that the plaintiffs were thereby injured in their business and property.

The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute.¹ We think that the plaintiffs are not restricted to their remedy by an action at law, but are entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiffs' bill, and continued to be used at the time of the hearing. The injury was to the plaintiffs' business, and adequate remedy could not be given by damages in a suit at law.

The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and

¹ Pub. Sts. c. 74, § 2; *Walker v. Cronin*, 107 Mass. 555.

property, and was a nuisance such as a court of equity will grant relief against.¹

Boston Diatite Co. v. Florence Manuf. Co.² was a case of defamation only. Some of the language in Springhead Spinning Co. v. Riley has been criticised, but the decision has not been overruled.³

Decree for the plaintiffs.

REINHARDT v. MENTASTI.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,
JULY 22, 23, 24; AUGUST 2, 1889.

[*Reported in Law Reports, 42 Chancery Division, 685.*]

C. W. REINHARDT, the plaintiff in this case, was a banker and money-changer, carrying on his business at and occupying No. 14 Coventry Street, Piccadilly. At the back of his house was a small wine cellar separated from the back of a hotel kept by the defendants by a party wall only. The defendants, Mentasti Brothers, had a large hotel in Arundell Street, called Previtali's Hotel, and they had recently put up in their kitchen a stove so near to the wine cellar of the plaintiff, that as he alleged and as appeared to be the fact, the wine cellar became so hot as to be unfit for the storage of wine. This action was brought, claiming an injunction and damages.

Neville, Q.C., and Wurtzburg, for the plaintiff.

Warmington, Q.C., and Farwell, for the defendants.

The result of the evidence and the arguments used are fully stated in the judgment of the court.

August 2.

KEKEWICH, J. For obvious reasons the result of this case may affect many localities and many persons. I therefore thought fit to reserve my judgment, and, although the conclusion which I am about to express is the same as that which I entertained at the close of the trial, I confess to some fluctuation of opinion since that time, as well as during the argument. I thought it possible, and indeed probable,

¹ *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

² 114 Mass. 69.

³ See *Boston Diatite Co. v. Florence Manuf. Co.*, *ubi supra*; *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, 3 C. P. D. 339; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Thomas v. Williams*, 14 Ch. D. 864; *Day v. Brownrigg*, 10 Ch. D. 294; *Gaskin v. Balls*, 13 Ch. D. 324; *Hill v. Davies*, 21 Ch. D. 798; *Hermann Loog v. Bean*, 26 Ch. D. 306.

that by studying some of the cases on this branch of law I should find a line of demarcation between those nuisances which may be said to partake of the character of trespass and those of which this cannot be averred, and a disposition on the part of the court to grant injunctions more readily against the former than the latter. My examination of the authorities has not justified this anticipation. There are, no doubt, expressions in some judgments which point to stronger protection being given where rights of property are invaded than where they are not; but, on the other hand, there are many cases in which a private nuisance, not affecting rights of property, except so far as to prevent a man from personally using his own with reasonable comfort, may be regarded as having been equally condemned. The principle applied in either class of cases is that a man must not use his own so as to injure his neighbor, and, in substance, the only question discussed in any given case is, whether that principle is applicable to the particular circumstances there occurring. Here there is really no dispute about the material facts. The defendants in adding to their hotel have recently converted what, it seems, was formerly an unused chamber into a supplemental kitchen, and have there placed a stove which is used for supplying hot water and cooking pastry. Not only is the stove one of an ordinary character and well constructed, but the defendants have taken divers precautions to prevent its being obnoxious, and the only thing to be said against them in this respect is that the stove does not occupy the site of the fireplace, which must be taken to have existed since the house was first built, and that thus far they have departed from the original plan of the building. And this use of their own house, alleged to be in all respects—and, subject to the one remark just made—apparently in all respects reasonable, has nevertheless proved exceedingly inconvenient to their neighbor, the plaintiff, whose cellar was situate right against the stove on the other side of the wall. It was reasonable for the plaintiff to have a cellar, and it cannot be said that it was otherwise than of a reasonable character or in an inconvenient place. The heat occasioned by the stove passing through the wall has injured the cellar. It has so injured the cellar that, according to the evidence, the plaintiff is unable any longer to store his wine there, and although he might keep there what is required for daily use, one ordinary and reasonable purpose of a cellar in a private dwelling house has gone. The plaintiff says that such interference with his reasonable use of his own property ought not to be allowed, and in answer it is said that the defendants, who on their part have only used their own property reasonably, are not to blame. The question which I have to decide is, which of them is right. The injury to the plaintiff being clear and

clearly arising from the stove, it lay on the defendants to establish that they were not culpable. In support of this position reference was made to several judgments, and more particularly to those of Lord Bramwell in *Bamford v. Turnley*,¹ and Lord Selborne in *Gaunt v. Fynney*,² which, with many others to be found in the books, contain passages insisting on the right of every man to act reasonably in the enjoyment and use of his own property, and the regard which must be had in every case to the special circumstances attending it, including the distinction between dwellings in crowded cities and those in the open country, and the unwillingness of the court to interfere at the instance of a plaintiff, who, from ill-health or other cause engendering fastidiousness, complains of that to which his neighbors, however reluctantly, find themselves compelled to submit. Such passages must of course be read in connection with the circumstances of the particular case under consideration, and, what is even more important, they must be read as not intentionally departing from, or rather, in absence of the proof to the contrary, as intentionally adhering to those principles and rules of law which a judge must be credited with bearing in mind, although he does not think it worth while to repeat or even expressly to refer to them. Thus read, the judgment of Lord Bramwell, who concurred with the majority of the court in reversing the decision of the Court of Queen's Bench, and also in overruling *Hole v. Barlow*,³ loses much of the weight which, in reliance on certain selected passages, was sought to be attributed to it by the defendants, and it is to be observed that in a recent case in the House of Lords, *Fleming v. Hislop*,⁴ the present Lord Chancellor epitomized Lord Bramwell's judgment with approval, as saying, "that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction." What fell from Lord Selborne in *Gaunt v. Fynney*⁵ may be explained in like manner, and must rather be understood as illustrating the convenience of what Lord Bramwell calls "the rule of give and take; live and let live," than as having established—which I am sure he did not intend to do—any new guide to the decision of cases where a legal nuisance has been proved to exist. I may pass by without further remark the cases of *Ball v. Ray*,⁶ *Sturges v. Bridgman*,⁷ and *Attorney-General v. Sheffield Gas Consumers' Company*,⁸ the judgments in all of which, and especially those in the last case, are instructive on this branch of law and on the points which were argued before me. But it is right

¹ 3 B. & S. 62.

² Law Rep. 8 Ch. 8.

³ 4 C. B. (N. S.) 334.

⁴ 11 App. Cas. 686.

⁵ Law Rep. 8 Ch. 8.

⁶ Law Rep. 8 Ch. 467.

⁷ 11 Ch. D. 852.

⁸ 3 D. M. & G. 304.

to say a word on *Broder v. Saillard*,¹ because that was eminently a case in which the defendant had behaved reasonably, and yet was enjoined from continuing a nuisance by a judge who thought the injunction such a hardship that he allowed that consideration to influence the costs. After an argument, in which both *Ball v. Ray*² and *Gaunt v. Fynney*³ were cited, Sir George Jessel states the general law in terms equivalent to those used by Lord Justice Knight Bruce in *Walter v. Selfe*,⁴ which has long been treated as giving the true rule of distinction between those nuisances of a personal character which do and those which do not merit an injunction. On page 701 he says: "I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbor makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it." He proceeds to explain why it is no answer to say that the defendant is only making a reasonable use of his property, stating that that cannot be the test, and lower down, on page 702, he says what the test, as applied to the case which he had under consideration, is, namely, "Whether the stables are unluckily so situated as that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the plaintiffs' dwelling-house, and prevents the people sleeping at night." If for "horses" you read "stove" and for "sleep" "use of cellar," which, though of course less necessary, and in that sense less entitled to protection, is yet, in my judgment, a reasonable requirement on the part of the plaintiff, you have a test exactly applicable to the case in hand. Agreeable to this is the opinion of Lord Blackburn, worthy of selection from numerous authorities, as expressed in *Scott v. Firth*.⁵ That was a case of nuisance by vibration, caused by steel hammers used in the defendant's workshops, which, besides interfering with the comfort of the plaintiff, had, it was alleged, cracked the walls of the adjoining cottages. The learned judge, in summing-up the case to the jury, stated the question to be whether it was one of nuisance—that is, of actionable wrong; and, after calling attention to the evidence of injury, added this: "A further point has been raised by the plea that the grievances complained of were caused by the defendant in the reasonable and proper exercise of his trade in a reasonable and proper place. My opinion is that in law that is no answer to the action. I think that that cannot be a reasonable and proper exercise of a trade which has caused such injury to the plaintiff as she complains of." It seems to

¹ 2 Ch. D. 692.² Ibid. 8 Ch. 8.⁴ 4 De G. & Sm. 315.² Law Rep. 8 Ch. 467.⁵ 4 F. & F. 349, 351.

me, therefore, that, notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is, does he injure his neighbor? I recognize some hardship in an injunction to restrain the defendants from doing that which I am obliged to regard as a reasonable use of their property—the better adapting to the purposes of an hotel a house situate in a neighborhood where hotels are conveniently built; but the hardship is not so great as that in *Broder v. Saillard*,¹ nor do the facts allow me to regard the defendants as so entirely passive as the Master of the Rolls considered the defendant to be there. Therefore, while granting the relief asked by the plaintiff, I am bound to do so with the usual consequences. I may, however, properly give the defendants some time to consider and do what is best under the circumstances, and I shall therefore make the injunction not enforceable for three months.

His Lordship gave the plaintiff the costs of the action, but ordered him to pay the defendants the costs of certain minor issues on which he had failed.

BELLAMY v. WELLS.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, NOVEMBER
26, 27, 28, AND 29; DECEMBER 1, 6, AND 8, 1890.

[Reported in *60 Law Journal, Chancery Division*, 156.]

THE plaintiffs were, first, the owners in fee of a house No. 33 Gerrard Street, Soho; secondly, the lessee thereof for the residue of a term of twenty-one years expiring at Christmas, 1898, at £130 rent, and who sublet portions of the house to weekly tenants; thirdly, a man who resided in and occupied two rooms, one at the back and one at the front, on the second floor of the house, as weekly tenant of the lessee; and fourthly, Isabella Phillips, the lessee of No. 36 Gerrard Street, who at an early stage of the action made default in obeying an order to give discovery, and gave no evidence in support of her claim.

Parts of each of the two houses Nos. 33 and 36 Gerrard Street were at the commencement of the action unlet and unoccupied, the last tenants having been compelled, as the plaintiffs alleged, to leave by reason of the acts of nuisance in respect of which the action was brought. Between 33 and 36 Gerrard Street, and immediately adja-

¹ 2 Ch. D. 692.

cent thereto, formerly lay 34 and 35 Gerrard Street, which were, prior to November, 1889, quiet residential houses, and down to the same date Gerrard Street was, according to the plaintiffs, a quiet, orderly street.

In November, 1889, the defendant, Arthur Ernest Wells, acquired the site of 34 and 35 Gerrard Street, and erected thereon the Pelican Club, which was formally opened in February, 1890.

The statement of claim set out alleged nuisances on the part of the defendant as follows:

“4. The said Pelican Club is avowedly a club for the promotion of sport, but its principal objects, in fact, are to promote the art of boxing and pugilistic skill, and to provide concerts and entertainments for its members at late hours of the night.

“5. The said club, according to its rules, remains open every night till 4 A.M., but is frequently kept open until a later hour.

“6. Since the opening of the said club in February, 1890, there have been held there two or three times weekly, and generally on Sunday nights, concerts or musical entertainments, commencing at 10 or 11 P.M., and lasting until 2 A.M., or later, and at these concerts or entertainments loud singing of songs and choruses and pianoforte-playing take place, with noisy applause and cheering. At several of the said concerts or entertainments bands of music have played at the said club between 10.30 P.M. and 4 A.M.

“7. On several occasions since the opening of the said Pelican Club, at the invitation of the defendant and the committee of the said club, pugilistic encounters for large stakes between professional pugilists have been held at the said club at late hours of the night, and on the occasion of these fights, and solely in consequence thereof, large crowds of noisy and disorderly persons have been attracted by the said contests, and have assembled in Gerrard Street aforesaid, outside the plaintiffs' said houses, and such crowds have remained there during the greater part of the night, shouting and creating very great noise and disturbance. The presence of the crowds exposes persons entering and leaving the plaintiffs' houses to danger and insult, and threatens injury to the plaintiffs' property.

“8. The said club causes a large number of cabs to assemble and remain in Gerrard Street (which is paved with cobbles) at night, and the movements of the cabs and the talking and shouting of the cabmen continue until 4 A.M. or later. The said cabs are summoned to the said club for use by its members by a shrill whistle.

“9. The several acts and things stated in paragraphs 6, 7, and 8 hereof occasion great noise, which seriously interferes with and disturbs the quiet of Nos. 33 and 36 Gerrard Street, and the rest and

sleep and the comfort and health of the plaintiff, William Stone," the tenant, "and other the tenants and occupiers of the plaintiffs' said houses. In fact, the said club and the proceedings in and connected with the same, heretofore stated, and the noise occasioned thereby, constitute a serious nuisance and annoyance to the plaintiffs and their lessees and tenants.

"10. The defendant, as the proprietor of the said club, has caused the several acts and things alleged in paragraphs 6, 7, and 8 to be done, and is liable for the same.

"11. Several tenants of the plaintiffs' said houses have left, giving as their reason for so doing the intolerable nuisance occasioned by the noises aforesaid.

"12. The defendant's said acts have already caused serious damage to the plaintiffs, and, if continued, will cause further depreciation in value, and a permanent injury to the said properties of the plaintiffs other than the said William Stone, and their interests in the said houses Nos. 33 and 36 Gerrard Street.

"13. The defendant threatens and intends, unless restrained by injunction, to continue to carry on the said club in manner aforesaid, and to repeat and continue the several acts and things stated in paragraphs 6, 7, and 8 hereof."

The plaintiffs accordingly claimed—first, an injunction to restrain the defendant from using or permitting to be used the Pelican Club or any part thereof for the purpose of glove fights, boxing contests, music, or other sports or entertainments, or in any other manner or for any other purpose whereby a nuisance might be occasioned to the annoyance and injury of the plaintiffs or any of them, or any of their tenants or under-lessees; secondly, damages; and thirdly, costs.

The statement of defence in paragraphs 1 and 2 denied, first, that tenants had left in consequence of any acts of nuisance; secondly, that down to November, 1889, Gerrard Street was a quiet, orderly street. It was, said the defendant, previously to the opening of Shaftesbury Avenue, a main thoroughfare for cabs and heavily-laden vehicles to and from King's Cross, St. Pancras, and Euston Railway Stations, at night and in the early hours of the morning; and it was then, he alleged, throughout its whole length, an authorized rank for waiting carriages and for cabs for the Shaftesbury Theatre, and was so prior to November, 1889.

The defence also alleged as follows:

3. The Pelican Club is a social and sporting club, and, in addition to fulfilling the ordinary and usual objects of a West-end club, encourages athletic and gymnastic exercises, including boxing. It also provides occasional concerts and entertainments for its members, but

the defendant denies that it is any object of the club to promote pugilistic skill, or that one of its principal objects is to provide concerts and entertainments for its members at late hours of the night.

4. The defendant does not admit that the club is frequently or ever kept open to a later hour than 4 A.M. In fact, no member is admitted into the club after 3 A.M.

5. The defendant denies that any concerts or musical entertainments have been held so often, or nearly so often, as alleged in the 6th paragraph of the statement of claim, or that they have lasted until 2 A.M., or that they have commenced so late as 11 P.M., or that any loud singing or choruses or pianoforte-playing takes place, or that there is any noisy applause or cheering, and he entirely denies that at any of the concerts or entertainments bands of music have played at the club until 4 A.M., or indeed until later than midnight, or at latest half-past 12. The concerts and musical entertainments, which take place on an average once in three weeks, commence usually at 10 o'clock, and, in fact, have never lasted more than two hours except on the occasion of the opening of the club, when a concert was held which lasted until 2.30 A.M. On two occasions only has a band of any sort played inside the club, and on each occasion the bands were string bands, and on one occasion the band consisted only of violins. The applause is confined to occasional clapping, and has never been noisy.

6. The defendant denies that on any occasion since the opening of the club, at the invitation of the defendant or of the committee of the club, or in fact have any pugilistic encounters been held at the club. There have been three glove contests and a boxing match. On the occasion of the boxing match no crowd whatever collected, and there was no noise or disturbance. In fact very little interest was taken in the same save by the members of the club. With regard to the three glove contests, one of them was over before 11 P.M., and the other two before 1 A.M. A small crowd collected on each occasion and dispersed immediately after the contest was finished, and there was no shouting or disturbance whatever, nor was the crowd composed of, nor did it contain, any disorderly persons. The defendant does not admit that the crowd was collected solely in consequence of the said contests, and he denies that the presence of the crowd exposes or has exposed any person entering or leaving the plaintiffs' houses to any danger or insult, or that it threatens any injury to the plaintiffs' property. The defendant did nothing whatever to collect the crowd, and did not make or sanction any announcement whatever of the intended contests or any of them.

7. The defendant does not admit that the club causes any cabs

whatever to assemble or remain in Gerrard Street, or that the movement of the cabs, or the talking or shouting of the cabmen, continued until 4 A.M. or later. The cabs assembling or remaining in Gerrard Street are collected in consequence of the theatres, hotels, and clubs in the immediate neighborhood, and very few (if any) are collected by reason of the Pelican Club. Cabs are summoned to the club for the use of its members by a whistle, which is not, however, a shrill one.

8. The defendant denies that any acts or things alleged in the statement of claim occasion any noise, or seriously, or at all, interfere with or disturb the quiet of Nos. 33 and 36 Gerrard Street, or either of them, or the rest or sleep, or the comfort or health of the plaintiff, W. Stone, or the tenants. The defendant also denies that any nuisance has existed.

Paragraphs 9 to 12 of the defence denied the rest of the allegations in the plaintiffs' claim.

Witnesses were examined on behalf of the plaintiffs and the defendant, and the effect of their evidence is sufficiently stated in the judgment.

The Solicitor-General (*Sir Edward Clarke*), Neville, Q.C., and *A. W. Rowden* for the plaintiffs.

ROMER, J., December 6th, delivered judgment as follows :

This is an action to restrain a nuisance by noise, alleged to be committed by the defendant, as proprietor of a club called the Pelican Club, whose premises are situate in Gerrard Street, Soho. The plaintiffs, Bellamy and Tylden, are freeholders of No. 33 Gerrard Street, which is immediately adjacent to the club. The plaintiff Eliza Turner is a lessee of No. 33 Gerrard Street for a term of years. The plaintiff William Stone is an occupant of part of No. 33. The plaintiff Isabella Phillips sued as lessee of No. 36 Gerrard Street, but no evidence was given in support of her case, and the action, so far as concerns her claim, must be dismissed. That leaves the action as one of nuisance only to the occupants and owners of No. 33 Gerrard Street. The club is a proprietary one, and the business of the club is carried on by the defendant alone for his own benefit, he alone receiving the profits derived from it, so that, beyond question, if any nuisance is caused by the club, the defendant is responsible for it. The case sought to be established by the plaintiffs may be divided into three heads—First, nuisance caused by certain boxing contests held at the club; secondly, nuisance caused by the whistling for cabs and carriages for members leaving the club, and the noise of the cabs and carriages themselves; and, thirdly, nuisance caused by music and singing in the club, and applause consequent thereon. With regard to the boxing contests, the facts are these : The

club is one formed for the purpose (*inter alia*) of affording entertainments to its members by boxing contests, for large money prizes, between celebrated professional pugilists. These contests are held from time to time in the season between October and August, in the basement of the club premises, generally about midnight or later. No complaint is made by the plaintiffs of any nuisance by noise arising directly from the contests, but it is said that they cause a large and rough crowd to assemble in Gerrard Street, which remains for hours, until the early morning, after the contests are decided, and which blocks up the street and makes a great noise by cheering, hooting, and whistling, especially when the combatants and their friends arrive at or leave the club, and when the result of the contests is announced, and during the time that the police are endeavoring to cause the crowd to move on or to disperse. The plaintiffs' witnesses gave evidence, especially with regard to three of these contests, which admittedly took place for large sums of money between well-known pugilists—the first in November, 1889, before the club premises were fully opened to the members; the second in February, 1890, on the occasion of the club premises being formally thrown open to the members; and the third in June, 1890. And the result of the evidence of the plaintiffs' witnesses was, that each of these three occasions caused a large mob to assemble, whose noise created an intolerable nuisance to the occupiers of No. 33 Gerrard Street and the surrounding houses, and prevented sleep until a late hour in the morning. For the defendant it was alleged (and witnesses were called to support his case) that, though on the three occasions referred to, and on one other occasion on the 31st of March last, there had been contests as alleged by the plaintiffs, and crowds had assembled in the street, yet the crowds were not so large or so noisy as alleged by the plaintiffs, and created no nuisance. For the defendant it was further contended that in any case he was not responsible for the crowd assembling, or for any nuisance it may have caused.

Now on the question whether or not, on the three occasions I have referred to, the crowd, in fact, caused a nuisance by noise to the occupiers of No. 33 Gerrard Street, and to William Stone in particular, after hearing the witnesses on both sides, I have come to the conclusion that the plaintiffs have proved such nuisance. As the witnesses on this question are substantially the same as those who deal with the next alleged nuisance, I defer for the moment any detailed reference to their evidence. It remains then for me to consider the point whether the defendant can be held responsible for this nuisance. On his behalf it was said that he had not invited the crowd, and did not desire its presence. This is true. But the question appears to me to turn upon this—whether the collection of the crowd under the circumstances was

not the probable consequence of the defendant's acts, for, if it was, then he is answerable, whatever may have been his object or desire, on the principle pointed out by Mr. Justice Littledale in the well-known pigeon-shooting case of *The King v. Moore*.¹ And the same principle is referred to in the case of *Walker v. Brewster*.² Now, I think that the collection of this crowd was a probable consequence of the defendant's acts, and one which (again to cite Mr. Justice Littledale) the experience of mankind would lead any one to expect as the result. This appears to me to follow, on consideration of the following facts. As appears from the evidence, these contests require at least a month's training on the part of the combatants, who are selected amongst the most distinguished of their calling, and a somewhat long notice has to be given to the competitors of the day on which the combat will take place between them, and this day so becomes known to their numerous friends and admirers, who appear to take a deep interest in the result of the contest, and flock to the spot where the combatants can be seen and the result most speedily known. Moreover, the club is a large one, numbering (as appears from the evidence) about 1,200 members, and notice of each approaching contest is given to the members some considerable time beforehand, and through them would naturally become well known to the numerous class who take an interest in pugilistic encounters. For instance, the notice given for the contest on the 27th of June is in evidence, and was clearly given before the 4th of June. Again, the defendant himself evidently contemplated that the result of his acts would be the assemblage of a crowd on these occasions, for on each of the three he gave previous notice to the police, so that they might be prepared with extra force to deal with the apprehended assemblage, and the police authorities made arrangements accordingly. And, lastly, I refer to the fact that on each of the three occasions, as also on the only other somewhat similar but less formidable occasion of the 31st of March, the prognostications of the defendant were amply fulfilled, and a mob did collect.

It further appears from the evidence that, unless the defendant be restrained by injunction, the occasions of nuisance I have referred to will probably be repeated, for the arrangements of the club are that these special contests shall take place at least four times in the course of each season, which commences some time in October and ends at the end of July, or thereabouts. Under these circumstances, and having regard to the serious nature of the nuisance, as proved by the plaintiffs' witnesses, being one taking place and preventing sleep on the part of those suffering from it for some time before and for some hours after midnight, I

¹ 3 B. & Ad. 184; 1 Law J. Rep. M.C. 30.

² 37 Law J. Rep. Chanc. 33; Law Rep. 5 Eq. 25.

have come to the conclusion that the plaintiffs are entitled to an injunction on this head; for it certainly cannot in my judgment be successfully contended by the defendant that, in holding these contests and so collecting noisy crowds at the late hour he does, he is using the club premises in an ordinary way or is not materially interfering with the ordinary comfort of existence of the occupiers of No. 33 Gerrard Street, "according to plain and sober and simple notions among the English people" (see judgment of Vice-Chancellor Knight Bruce in the well-known case of *Walter v. Selfe*.¹

The next complaint of the plaintiffs I have to consider is with reference to the whistling for cabs and carriages, and the noise caused by the cabs and carriages driving up to and away from the club. As to this there is again a conflict of testimony. I will first state what is the result I have arrived at, after seeing and hearing the witnesses on both sides and considering their evidence. The club is what is called a late one, and was described by one of its members (a witness for the defendant) as a Bohemian club. It appears to be largely frequented after midnight, and remains open until a very late (or early) hour in the morning. Members are leaving from time to time, and frequently (on some nights, of course, not so often as on others) at all hours after twelve, up to as late as six in the morning. During these hours from time to time cabs are whistled for by the usual loud street whistle familiar to us all, and then the cabs answer to the whistle and pass rapidly to the club over the adjacent street, which is here paved with cobbles. Often, in answer to the whistle, two or more cabs race for the fare, and this causes additional noise, often varied by the violent language of the cabman who fails to secure the fare. The effect of the loud noises caused by the cabs, and the whistling, repeated night after night at divers times between midnight and six in the morning, has been, in my judgment, to wake up repeatedly, between those hours, and almost every night, those occupants of the houses near the club who sleep in rooms fronting on the street, and to cause a nuisance to them, and in particular to the occupants of No. 33 Gerrard Street, and an injury to the lessee and freeholders of No. 33 Gerrard Street, by lowering the rental value of that house (which is let out to the occupants as weekly tenants), and by making it difficult to procure tenants except of an inferior class, and at reduced rents. This being the conclusion of fact I have come to on this part of the case, it follows that an injunction must go against the defendant. For him it was urged that every householder has a right to call cabs to his house for the convenience of himself and guests, and to use a whistle for the purpose. The answer is that, whatever may be the right of a householder when using his house in an ordi-

¹ 4 De Gex & Sm. 315 : 20 Law J. Rep. Chanc. 433.

nary way, the present is in no wise an user of an ordinary or common kind. The defendant is carrying on a large business as a club proprietor, and a business of a peculiar kind. It is not the ordinary practice of the occupier of a house in London to keep it habitually open for numerous guests up to five or six every morning, and to call cabs for those guests by whistles at frequent intervals between midnight and 5 or 6 A.M. Counsel for the defendant urged that, even in the quietest parts of London, the occupants of a house must occasionally suffer, without complaint, from a ball at a neighbor's kept up late, and from the noise arising from the calls of the linkmen and the arrival and departure of the carriages and cabs of the guests. That is because the balls are not frequent, and people in London must and do act on the give-and-take principle, and reasonably. But those who have been kept awake by the noise of a neighbor's assembly know that it is not pleasant, even for a single night, and no inhabitant would be bound to submit to his rest being disturbed night after night because his neighbor chose to indulge in over-lavish hospitality. [His Lordship examined the evidence in detail, as to the nuisances by boxing contests, crowds, whistling, and cabs, and continued:] On the whole evidence, I think it appears that the street is not at all an exceptionally noisy street, and certainly the noises suggested to arise from other houses in the street, such as the Italian Club and the French Club, and from cabs going to the railway stations through the street, could not be compared with or excuse the noises complained of by the plaintiffs in this action. I may add that, assuming a nuisance by noise to arise from the club to the occupiers of No. 33 Gerrard Street, who are weekly tenants, it is clear that the case is one entitling the owners and lessees of that house to sue as co-plaintiffs, and indeed that proposition was not contested by the defendant's counsel. I have still to consider the third head of complaint, which is quite distinct from, and supported by different witnesses from those who gave evidence on, the former heads of complaint.

The third complaint is of nuisance by music and singing and applause in the club premises. This divides itself into two parts—the one being a complaint as to certain concerts performed in the club, and the other relating to the playing of the piano and singing songs, with choruses and applause, by certain members of the club at irregular intervals during the early hours of the morning. This alleged nuisance would at most only affect those residing at the backs of the houses adjacent to, and on the same side of the street as, the club. With regard to the concerts, I think the plaintiffs' case clearly fails; and indeed their counsel scarcely relied upon this part of the case, and I say no more about it. The other complaint requires consideration, though on this also I have come to the conclusion that the plaintiffs' case fails. In the

first place, it is to be remembered that I am only trying a case of nuisance to No. 33 Gerrard Street, and not to any other house. Now, no occupier of No. 33 Gerrard Street gave any evidence of annoyance on this head, and the owners and lessee of No. 33 have not shown by any direct evidence that they have lost tenants or rent, or suffered injury by the particular noises I am now considering. But it is said that a nuisance was proved to certain occupiers of Nos. 32 and 36, and that, as No. 33 is between those two houses, I must assume or infer that the owners and lessee of No. 33 are injured. This contention is, I think, unsound. I cannot make any such assumption or inference. But, beyond this, no nuisance to any occupier of either No. 32 or 36 was established to my satisfaction by the particular noises I am now considering. [His Lordship examined the evidence of the witnesses on this part of the case, and concluded :] I think their evidence is not sufficient, as against the evidence adduced by the defendant, to establish a nuisance to my satisfaction, though I have not overlooked the evidence on behalf of the defendant to the effect that on about two dozen times there may have been playing on a piano and singing, with occasional choruses, by some members at late hours, and that a somewhat deaf witness at No. 37 appears on one or more occasions to have heard the music from the club. It follows that, in my judgment, the plaintiffs' case as to the music, singing, and applause fails.

I have now to consider the form the injunction must take on those parts of the case on which the plaintiffs have succeeded. It requires care in framing, in order not to press upon the defendant unduly, or beyond what is absolutely required to protect the plaintiffs. It will go in the following form—and it will be seen that I have limited the injunction, in the case of the whistling and cabs, to the hours between midnight and 7 A.M., as I think it is from the noise within those hours that substantially the plaintiffs are suffering: "An injunction to restrain the defendant from carrying on, or permitting to be carried on, by himself, his manager, or agents, the business or concern of the Pelican Club, on the club premises in the pleadings mentioned, so as to cause a nuisance by noise to the plaintiffs (other than the plaintiff Isabella Phillips), or any of them, as owners, lessee, or occupiers of the premises No. 33 Gerrard Street, Soho, or any of the tenants or under-lessees of the plaintiffs Bellamy, Tylden, and Eliza Turner, or any of them, as owners or lessee of the last-mentioned premises—first, by cabs or carriages driving to or leaving the club premises, and the whistling for carriages or cabs to the club between the hours of midnight and 7 A.M.; and secondly, by any crowd caused to be assembled by the boxing contests or entertainments held at the club premises." The injunction, thus limited, will not in any way prevent the defendant

from efficiently carrying on the business of the club in a reasonable manner.

This is not a case for inquiry as to damages, nor was any asked for by the plaintiffs' counsel. Then, as to costs, the defendant must pay to the plaintiffs the general costs of the action, except the following costs, which the plaintiffs must pay to the defendant: First, the costs of the plaintiff Isabella Phillips, and secondly, the costs of the action so far as they have been increased by the claim in respect of playing, singing, or applause in the club premises, with a set-off. There should be liberty to apply; and the costs of the motion for an injunction, and of the appeal from the decision thereon, will be costs in the action.

ROMER, J., December 8. There are two slight alterations to be made in the form of the judgment. The plaintiffs succeeding will have the general costs of the action except so far as the costs have been increased by the claim of Isabella Phillips, and by the claim in respect of playing, singing, or applause in the club premises, which latter costs the plaintiffs must pay to the defendant.

JOHN P. CRANFORD ET AL., RESPONDENTS, *v.* MARTIN D. TYRRELL, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 6, 1891.

[*Reported in 128 New York Reports 341.*]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

James & Thomas H. Troy for appellant.

Alfred E. Mudge and *Johnson & Lamb* for respondents.

GRAY, J. In this action, which was brought to restrain the defendant from keeping a house of ill-fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiffs' premises have been interfered with and rendered uncomfortable, and whereby the occupants of plaintiffs' premises have been annoyed and seriously disturbed."

Such a finding was amply justified by the evidence and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature; inasmuch as the damage they suffered was a damage common to the whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial court to have denied the relief prayed for.

The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighborhood, furnishes, of itself, no ground for equitable interference at the suit of a private person; and though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance.¹

If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered.² One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property, the law will not suffer a man to be restrained; but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy

¹ See *Francis v. Schoellkopf*, 53 N. Y. 152.

² *Rose v. Miles*, 4 M. & S. 101; *Rose v. Groves*, 5 Man. & G. 613; *Francis v. Schoellkopf*, *supra*; *Lansing v. Smith*, 4 Wend. 9.

in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked.

In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as they rendered the plaintiffs' house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained and to their equitable right to have its continuance restrained.

The judgment appealed from should be affirmed, with costs.
. All concur.

Judgment affirmed.

ENGLISH *v.* PROGRESS ELECTRIC LIGHT AND MOTOR COMPANY.

IN THE SUPREME COURT OF ALABAMA, DECEMBER TERM, 1891.

[*Reported in 95 Alabama Reports 259.*]

THE bill in this case was filed on the 22d of February, 1888, by Mrs. Martha E. English and others, owners of certain real estate in the city of Mobile, against the Progress Electric Light & Motor Company, a private corporation engaged in the business of manufacturing and furnishing electric lights for the streets, public buildings, private residences, etc., in the city of Mobile; and sought an injunction to abate the defendant's works as a nuisance, causing the complainants' great inconvenience, discomfort, and injury, as more fully stated in the opinion. On final hearing on pleadings and proof, the court below dismissed the bill; and its decree is here assigned as error.

Greg. L. & H. T. Smith for appellants.

J. Little Smith, Thos. H. Smith, and Overall & Bestor, contra.

CLOPTON, J. Appellants invoke the interference of the Chancery Court to abate by injunction, as a nuisance, the electric plant maintained and operated by appellee in the city of Mobile. The remedy sought is preventive, and incidentally compensatory. An injunction for

such purpose is not a matter of absolute right; but, if, as has been said, it rests in judicial discretion, the exercise of such discretion is not without limitations, and is to be guided by the settled principles on which the interference by the court in such cases depends. In considering whether or not an injunction should be granted, regard must be had, on the one hand, to the right of every person to use his own property as his taste, desires, and interest may dictate; and on the other, to the right of his neighbors to the comfortable and unmolested use and enjoyment of their property. No one should be restrained as to the use of his property, unless such use offends the legal rights of another. There are, certainly, instances of private nuisances, for which an action on the case can be maintained, yet insufficient to justify interference by injunction. This extraordinary and transcendent power should be exercised only when imperatively necessary to prevent multiplicity of suits, or irreparable injury, or continuous or constantly recurring grievances—when, from their irreparable nature, continuance, or frequent repetitions, the legal remedies are inadequate to afford full redress. While it is not essential that the injury should be strictly continuous, it must not be only occasional, or accidental.¹

The plant of defendant was first established in April, 1885, and was operated and used by Cawthorn and his associates, for the purpose of lighting the dwellings and stores in the city of Mobile, until April, 1887, when they sold it to defendant, who has continued its operation, lighting the streets as well as dwellings and stores. The house in which complainant resided is a one-story frame house, having four rooms, with kitchen and servants' rooms, and is situated on a mound about twelve feet above the level of the street and the adjacent property. Many years ago, the streets in that portion of the city were graded to the level of the wharves, and the adjacent property, except complainants', cut down to the level of the streets. Brick walls were built on the four sides of complainants' lot, for the purpose of supporting the embankments.

The bill avers that defendant has a contract with the city of Mobile, under which it lights the streets of the city with electricity every night when the moon is not shining, and for this purpose uses four large boilers and several large dynamos; the ends of the boilers projecting to within a few feet of the wall of complainants. It further avers that, when the plant is in operation, a dense smoke is produced, the soot from which, in certain conditions of the atmosphere, is frequently blown up and into complainants' houses, and fills them, unless the windows are closed. Further, that the machinery, when in operation, frequently and at intervals makes a loud palpitating noise like the puffing of a loco-

¹ *Rouse v. Martin*, 75 Ala. 570; 16 Amer. & Eng. Encyc. of Law 959.

motive when pulling a heavy train up-grade, which noise is sufficiently loud to be heard two hundred yards away; also, frequently creates a severe vibratory motion which shakes the surrounding buildings, and especially the buildings owned by complainants. The bill further avers, that the noise, vibrations, and smoke are all made in the night-time, and frequently continue from early in the evening until nearly morning; that the noise disturbs the sleep of the occupants of the buildings, and the vibrations are so severe as to make the table-ware upon the tea-table and the windows of the house rattle, the chairs and furniture in the house rock, and to shake the occupants when in bed; that such noise and vibrations not only interfere with the sleep of the occupants, but render them nervous, and make the houses undesirable as places of residence, even for those in health, and in case of sickness would so excite an invalid as to seriously affect speedy recovery, and in certain cases be seriously dangerous to life. The bill further avers, that on several occasions portions of the machinery have burst, or blown out, making a loud noise greatly frightening complainants, causing them to run out into the street; that there is constantly thrown from said machinery steam in large quantities, and hot water which runs down the gutters in front of and around the residence of complainants, to their annoyance; that the proximity of said boilers and machinery greatly increases the risk from fire, and rate of insurance, also adding great danger from the explosion of the boilers and breaking of machinery.

The answer denies these allegations of the bill, and sets up the great utility of the business to the public; also, that if there were causes of complaint at the commencement of the business, they have been obviated by the application of scientific appliances, and that any inconvenience experienced by complainants could have been prevented with little effort; also, that the acquiescence and fault of complainants induced defendant to invest a large sum of money in improving the plant.

It is difficult, if not impracticable, to formulate a rule accurately defining the acts or facts which will constitute a nuisance under any and all circumstances. We shall not make the attempt. As a general proposition, it may be said, that any establishment erected on the premises of the owner, though for the purposes of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance. In applying this principle, it has been repeatedly held, that smoke, offensive odors, noise, or vibrations, when of such degree or extent as to materially interfere

with the ordinary comfort of human existence, will constitute a nuisance.¹ This principle has been applied to various kinds of factories and industries located in a city, including gas-works, and the production of light by the operation of a steam-engine and dynamos.² The averments of the bill clearly make a case of nuisance, calling for its abatement by the Chancery Court; but the denials of the answer, and the affirmative and substantial defenses set up therein, make the necessity of interference turn upon the sufficiency of the evidence, proper legal principles being applied, to show that the electric plant, as now operated and conducted, so materially interferes with complainants' use and enjoyment of their adjacent dwellings as to entitle them to injunctive relief.

From this consideration the evidence relating to the offensive odors may be eliminated, there being no allegation in the bill touching this matter; also, the evidence relating to risk from fire, danger of explosion, depreciated value of the property, and the increased rate of insurance; for such wrongs may be adequately redressed at law. This narrows the inquiry to the degree or extent of the noise, smoke, soot, and vibrations. There is a mass of evidence, many witnesses having been examined by both parties, and the testimony is voluminous. The evidence is conflicting in material respects. Appellants' counsel contend, that the testimony of the contradicting witnesses on the part of defendant is entitled to but little weight, for the reason, that but few of them were ever in the house of complainants, and these only for a short time, and the others live at a great distance. Naturally, the noise and vibrations diminish in proportion to distance; but the force of the argument is impaired by the fact, that one of the most material witnesses resides in the dwelling-house owned by complainants, and mentioned in the bill as subject to the same disturbances, and some of the others in dwellings in the same block, while some of complainants' witnesses reside in dwellings in a different block and across the street. The testimony of defendant's witnesses, having a material bearing upon the inquiry, should not be ignored, but accorded such right as it may be entitled to, when the entire evidence and the construction and operation of the plant are considered. We shall not attempt, however, to follow counsel in their elaborate discussion of the evidence. Though the testimony of the witnesses on the part of complainants may be somewhat exaggerated by super-sensitiveness, and an excited imagination, it may be conceded that their evidence strongly tends to show material annoyance and inconvenience caused by the smoke, soot, noise, and vibration during

¹ *Rouse v. Martin, supra.*

² *Cleveland v. Citizens' Gas Co.*, 20 N. J. Eq. 201; *Tocum v. Hotel St. George Co.*, 18 Abbott's New Cases 340.

the administration of Cawthorn, and even for a time after defendant purchased and operated the plant.

The evidence, however, shows that defendant has made alterations and improvements, especially as to the escape of steam, which have greatly diminished the evils complained of. As to an establishment of public utility in a city, the rule is, that its lawful use will not be perpetually enjoined, when, by the application of scientific appliances, such alterations in the machinery may be made as will remedy the evils. In such case, the court will go no further than to require such appliances to be introduced; and in some cases will direct a reference, to ascertain if the evils can be thus remedied.¹ On the same principle, the court will not make the injunction perpetual, when such appliances have been used, even during the pendency of the suit, and the desired results effected. The real and important question is, does the manner in which defendant operates the plant, since the alterations and improvements were made, interfere with comfortable use and enjoyment of their residence by complainants to such extent as to create a nuisance, which, when the locality and the circumstances are considered, it becomes the duty of the court to enjoin? The witness Long testifies, that the noise has been diminished exceedingly, and that it "is not a hundredth part of what it was before these changes were made"; and Sossaman says, "I could feel no vibration there, but I know that sometimes, while walking down the street, one can feel a little shaking, which is caused by the running of a dray, and I noticed no more vibrations about that place than the running of a dray might cause. At the time I speak of the machinery was in motion." We have especially referred to the testimony of these witnesses, for the reason that Long resides in the dwelling owned by complainants and mentioned in the bill, and Sossaman went to the house at the instance of complainants, to examine and give an opinion; his attention was directly called to the subject. Their evidence is corroborated by the testimony of several other witnesses. There is, however, conflicting evidence on the part of complainants.

The evidence further shows, that by a comparatively small expense complainants could avoid the inconveniences and annoyances arising from the vibratory motions. When such is the case, a perpetual injunction will not be granted, full compensation being obtainable at law. In *Rosser v. Randolph*,² the bill was filed to enjoin the erection of a mill, which, it was alleged, would be injurious to the health of the neighborhood, and would drown and render useless a spring on which complainant relied to furnish himself and family with pure water. The mill

¹ *Green v. Lake*, 54 Miss. 540; s.c. 23 Am. Rep. 378; 1 High. on Inj. § 787.

² 7 Porter 238.

having been erected, and it not appearing that the health of the community had suffered, the court said in reference to the spring: "By the application of labor, the value of which can be ascertained, or which the defendant, if applied to, might be willing himself to do, the spring can be restored to its original state; thereby giving to complainant the full enjoyment of his spring of water, and at the same time securing to the defendant those rights which appertain to him as owner of the adjacent land." Also, in *Kingsbury v. Flowers*,¹ where the bill was filed to enjoin future interments in a private burial-ground, it is said: "The apprehension of injury from this course, it is evident, could be quieted by but slight labor expended in drainage—a labor, it may be, if requested, the defendant would have performed, rather than to have been forced into this litigation." These were cases in rural districts; the rule is especially applicable to industrial establishments in a large city.

We do not think the evidence shows that the locality in which the plant was situated is so exclusively devoted to industrial enterprises, or business purposes, or so remote, as to afford defendant immunity on this account. The dwellings of complainant and others in the vicinity were erected long before the plant was established. However, a person cannot expect to possess, in a city, the peace, quiet, enjoyment, and freedom from annoyances of the country, and must submit to the ordinarily incidental annoyances of living in a city. It has been aptly said: "A person who resides in a large city must not expect to be surrounded by the stillness that prevails in rural districts. He must necessarily hear some of the noise, and occasionally feel slight vibrations, produced by the movements and labor of its people, and by the hum of its mechanical industries. The aid of a court may be invoked to keep annoying sounds within reasonable limits. Every noise, however, is not a nuisance, nor, when produced in the exercise of a lawful occupation, should the strong arm of a chancellor be extended to suppress it."² Whether or not the transcendent power of the court should be exercised, under such circumstances, must be determined in view of the relative rights of the parties and the public welfare.³

Unquestionably, the electric plant is of great public utility, and its abatement by injunction would entail heavy loss upon its owners, and, according to the testimony, increased cost of light to the citizens of Mobile. The machinery is of the best quality employed for electrical purposes; its officers and agents are shown to be skillful, and acting in

¹ 65 Ala. 479.

² McCaffrey's Appeal, 105 Penn. State 253; *Louis. Coffin Co. v. Warren*, 73 Ky. 400; s.c. 57 Amer. Rep. 467.

³ *Gilbert v. Showerman*, 23 Mich. 443.

good faith. Efforts have been made with considerable success, and are still being made, to prevent injury and annoyance to the occupants of adjoining dwellings. One of the chimneys is eighty feet high, and the other seventy, forty or fifty feet higher than the roof of complainant's residence, and sufficiently high to discharge the smoke in the air, so as not to incommodate complainant, unless in abnormal conditions of the atmosphere, which occur only occasionally. Though the locality in which the plant is situated may not be of such nature as to defeat its abatement, if its operations cause substantial injury to neighboring dwellings, or material annoyance to the occupants; yet, when by the application of scientific appliances, or by the expenditure of a reasonable amount of labor and money, the evils can be obviated, or diminished so as to amount to no more than are ordinarily incident to a city life, the rights of the parties will be preserved, the infliction of heavy loss prevented, and the public interest subserved, by withholding equitable interference, and leaving the complaining party to pursue the legal remedy.

By the settled rule in this State, a case must be proved which establishes the necessity of a preventive remedy—a case within that class of cases of irreparable or continuous injury which can be adequately redressed only by injunction; and in all cases, where the right is doubtful, and the exercise of the power would interfere with industries promotive of public utility, it becomes the duty of the court to abstain from interfering. In such cases, the proof should be clear and convincing, and the power "should be cautiously and sparingly exercised."¹ A careful examination and review of the mass of evidence forces the conclusion, that complainants have failed to establish, clearly and convincingly, a case of imperative necessity. The evidence leaves the mind in doubt, whether complainants have suffered, since the alterations and improvements were made, any substantial injury, or material discomfort, more than is usually incident to a residence in a city, or which could not be prevented by the application of labor or money, that may be adequately redressed at law.

Affirmed.

¹ Ray *v.* Lyons, 10 Ala. 63; Rouse *v.* Martin, *supra*.

LEOPOLD ADLER, RESPONDENT, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 25, 1893.

[Reported in 138 New York Reports 173.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 3, 1892, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action, and the material facts, are stated in the opinion.

Brainard Tolles for appellant.

Charles P. Cowles for respondent.

ANDREWS, Ch. J. We are of opinion, however, that that part of the judgment, which enjoins the defendants from maintaining the part ~~of~~ the station structure located in Eighth Street and directing its removal so far as it encroaches on that street, should be reversed.¹ It appears that in Eighth Street the defendants have placed an iron pillar and that a portion of its station encroaches on Eighth Street about two feet and extends within about two feet ten inches of plaintiff's house. It is claimed in behalf of the plaintiff that the authority vested in the defendants to construct stations, limits them to a location wholly within the lines of First Avenue, and that any extension of any part of the structure into Eighth Street was unlawful and without authority, and that, therefore, the judgment requiring the defendants to remove the part of the structure in that street was authorized. It is claimed by the counsel for the defendants that there is no such narrow restriction of their authority in the location of their stations as is claimed by the plaintiff.

But without considering this contention we are of opinion that this part of the judgment should be reversed on the ground that the plaintiff is not the representative of the public right, and that assuming that the location in Eighth Street was an infringement of the public right in the street, he cannot, in his capacity as a citizen merely, maintain an equitable action for an injunction for the removal of the obstruction, and that he cannot maintain it as the owner of adjacent property, for the reason that the case discloses that he has no interest in the soil occupied by the station, and that it is not shown by the evidence that he has sustained any substantial injury, by reason of the encroachment, to any right appurtenant to his premises. The rule is elementary that a private individual cannot maintain an action to abate a public nuisance unless he is specially injured, nor will the court exert its equita-

¹ Only so much of the opinion is given as relates to this question.—ED.

ble power of injunction in a case of a violation of a mere abstract right, unaccompanied with any substantial injury, present or apprehended. The erection of a pillar or other structure in front of plaintiff's premises in the street, which does not substantially and appreciably interfere with the plaintiff's right to light, air, and access to his premises, furnishes no ground for his invoking the equitable powers of the court. In the present case there is no evidence which would justify a finding that any distinct, separate, or additional injury to the plaintiff's premises was inflicted by the encroachment in question. He was allowed damages for the permanent injury to his property from the existence of the railroad and station in First Avenue, and the attempt to separate the damages caused by this encroachment of two feet from that caused by the rest of the station was impracticable. The plaintiff failed to show any special injury or any injury whatever from the part of the structure in Eighth Street. There was no invasion of anything in the nature of a property right of the plaintiff by the erection, unless it perceptibly interfered with his easements of light, air, and access to his premises, and this was not shown.

The authorities are numerous that special injury is an indispensable condition to the maintaining by a private person of an action to abate or restrain a public nuisance.¹

The judgment should be modified by striking out that part of the judgment relating to the structure in Eighth Street, and, as so modified, affirmed, without costs to either party in this court.

All concur.

Judgment accordingly.

LAMBTON *v.* MELLISH.

LAMBTON *v.* COX.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,
JULY 13, 1894.

[*Reported in Law Reports, 3 Chancery (1894), 163.*]

THE plaintiff was the lessee and occupier of a house adjoining Ashstead Common in Surrey. The premises of the defendant Mellish were about 60 or 70 yards from the plaintiff's premises, and those of the defendant Cox were about 120 or 130 yards from the plaintiff's premises and about 100 yards from those of the defendant Mellish, and were separated from both by a line of railway.

It appeared that during the summer months a large number of school

¹ *Lansing v. Smith*, 8 Cow. 146; *Doolittle v. Supervisors*, 18 N. Y. 155; *Fort Plain Bridge Co. v. Smith*, 30 Id. 44.

treats and assemblages of that description took place on Ashstead Common.

The defendants Mellish and Cox were rival refreshment contractors who catered for visitors and excursionists to the common, and both the defendants had merry-go-rounds on their premises, and were in the habit of using organs as an accompaniment to the amusements.

It appeared from the evidence that these organs were for three months or more in the summer continuously being played together from 10 or 11 A.M. till 6 or 7 P.M., and that the noise caused by the two organs was "maddening."

The organs used by Mellish had been changed, and it was alleged by him that the organ in use when the motion was made was a small portable hand organ making comparatively little noise. That used by Cox was a much larger one provided with trumpet stops and emitting sounds which could be heard at the distance of one mile.

The plaintiff now moved against the defendant in each action for an injunction restraining him from playing any organs so as to cause a nuisance or injury to the plaintiff or his family, or other the occupiers of the plaintiff's property.

Farwell, Q.C., and *Borthwick*, for the plaintiff in both actions.

Whitehorne, Q.C., and *Butcher*, for the defendant Mellish.

Maloney for the defendant Cox.

CHITTY, J. Notwithstanding the conflict of evidence, I am of opinion that the plaintiff is entitled to the injunction he asks for as against the defendant in each action.

A man may tolerate a nuisance for a short period. A passer-by or a by-stander would not find any nuisance in these organs; but the case is very different when the noise has to be continuously endured: under such circumstances it is scarcely an exaggeration to term it "maddening," going on, as it does, hour after hour, day after day, and month after month. I consider that the noise made by each defendant, taken separately, amounts to a nuisance. But I go further. It was said for the defendant Mellish that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination each would be a wrongdoer. If a man shouts outside a house for most of the day, and another man, who is his rival (for it is to be remembered that these defendants are rivals) does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense it must be the

other way. Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion each is separately liable, and I think it would be contrary to good sense, and, indeed, contrary to law, to hold otherwise. It would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by Lord Justice James in *Thorpe v. Brumfitt*.¹ That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says:² "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant." There is in my opinion no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions in the terms of the notices of motion.

ROSS AND OTHERS *v.* BUTLER.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM, 1868.

[Reported in 19 *New Jersey Equity Reports* 294.]

ARGUED on rule to show cause why an injunction should not issue.

Mr. H. V. Speer for complainants.*Mr. IV. Strong* for defendant.

THE CHANCELLOR. The complainants in this bill are seven in number. Each owns and occupies a dwelling-house in the city of New

¹ Law Rep. 8 Ch. 650.² Law Rep. 8 Ch. 656.

Brunswick, on Burnet Street, between New Street and Oliver Street. The defendant, Butler, owns what is known as the Dunham lot, on the west side of Burnet Street, nearly equi-distant from New Street and Oliver Street, which are five hundred feet apart. The defendant's lot is one hundred feet wide, by two hundred feet deep. The complainant, Agnew, resides in his own house opposite the lot of the defendant, and forty feet distant from it.

The defendant has commenced erecting a building on his lot on the line of the street, to be used as a pottery for manufacturing and burning earthenware. It is to be three stories high, and to contain two furnaces, and two kilns for burning the earthenware. This ware he intends to burn in this building with pine wood, which emits large volumes of dense and offensive smoke loaded with cinders. These facts are alleged in the bill, and admitted, or not denied by the answer.

The complainants allege that the smoke and cinders from this pottery, will descend upon their roofs, and into their yards, penetrate their dwellings, injure their goods and furniture, and injure and impair the health and comfort of themselves and families. They allege that the defendant intends erecting his building of wood, and that the same will be very combustible, and will, by reason of the large fires, be apt in dry weather to cause and communicate fire to the neighboring buildings.

They further allege, that the defendant has had a small pottery for some years on the rear of his lot, one hundred feet distant from Burnet Street; and that this part of New Brunswick is closely and compactly built up and inhabited, and that the erection of this pottery upon Burnet Street, will greatly depreciate the value of their property.

The defendant further answers and insists, that this part of New Brunswick is inhabited principally by mechanics and laborers, many of whom use their houses and lots for business purposes, and that the complainants so use their premises; that the complainant, Agnew, is a lock and gunsmith, and carries on his business, and has forges and makes smoke on his premises; and that it is a suitable and convenient place to carry on the business of a pottery, and that his intended establishment will be no injury to the property of the complainants.

This question, whether the locality of works which in most places would be a nuisance, is a justification of their erection and maintenance, has never been considered or adjudicated in New Jersey.¹ In the case of *Butler v. Rogers*,² the complaint was the erection of an additional blacksmith shop on premises which had been occupied for making locomotives for twenty years, in the midst of the business part of the manufacturing town of Paterson; and the establishment of the

¹ Only so much of the opinion is given as relates to this question.—ED.

² 1 Stockt. 487

complainant, to which injury was apprehended, was a large paper-mill which had a blacksmith shop connected with it on the same lot, and nearer to it than the projected shop of the defendants. Yet Chancellor Williamson, in refusing the injunction, although he recites these facts, does not place his opinion on that ground; and it may seem a fair inference that he did not think this ground sufficient, but he does not so declare.

I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders. Some parts of a town may, by lapse of time, or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise, and dust, that an additional factory, which adds *a little* to the common evil, would not be considered at law a nuisance, or be restrained in equity.

There is no principle in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy.

An injunction must issue against using the building for burning earthenware, or any manufacture with pine wood, or any fuel that may emit large quantities of dense smoke. The injunction, of course, may be removed or modified, if, upon the final hearing of the cause, it appears that the consequences, on which this decision is founded, will not follow from such use of the premises.

CHARLES G. DAVIS AND OTHERS *v.* FRANCIS A. SAWYER
AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 7, 1882.

[*Reported in 133 Massachusetts Reports 289.*]

W. ALLEN, J. This is a bill in equity praying for an injunction to restrain the defendants from ringing a bell. The case comes here on appeal by the defendants from a decree entered by a single judge, enjoining them from ringing the bell earlier than half after six o'clock

in the morning. The plaintiffs for many years have owned and occupied dwelling-houses situated, one about one thousand feet, and the other about three hundred feet, from a woollen mill of the defendants. The defendants began to run their mill, which had been before that occupied by other persons, in December, 1879, and about January 1, 1880, placed the bell upon the mill, and caused it to be rung every working day at five o'clock, and twice between six and six and one-half o'clock in the morning, and at other times during the day, except that the five-o'clock bell was discontinued during the summer months.

The plaintiffs allege that the bell as rung is a private nuisance to them, and injures their property, and disturbs the quiet and comfort of their homes; that it is not necessary for any purpose of trade or manufacture; that it is unnecessarily large, and rung at unseasonable hours, and unreasonably long. The defendants in their answer deny that the bell is a nuisance to the plaintiffs, and say that it is used by the defendants to summon the operatives in their mill to work; that it is necessary and customary to adopt some method to summon operatives in such a manufactory to their work; that the bell is of suitable size, and rung at suitable hours, and in a proper manner, for that purpose.

Two questions are presented: whether the plaintiffs have proved that the ringing of the bell is a nuisance to them;¹ and whether it is such a nuisance that this court will interfere to restrain it by injunction.

The other question presented is, whether the plaintiffs are entitled to an injunction. Upon general principles, they would be entitled to an injunction against a nuisance of this nature, for the obvious reason that they can have no adequate remedy in actions at law for damages.² But the defendants argue that relief by injunction is in the discretion of the court, and will not be granted where it will be inequitable between the parties, or will work detriment to the public, and that, in this case, the abatement of the nuisance by injunction will involve damage to the defendants in a lawful business, carried on by them to the public benefit, disproportionate to the damage to the plaintiffs from its continuance; and that the court ought not to interfere by injunction, but leave the plaintiffs to their remedy in damages which may be recovered in actions at law.³ The business in which the defendants are engaged is such a

¹ So much of the opinion as relates to this question has been omitted.—ED.

² Cadigan *v.* Brown, 120 Mass. 493.

³ "It has been urged upon me more than once during the argument by the counsel for the defendants, that there are 250,000 inhabitants in the town of Bir-

business; and if it appeared that the effect of an injunction would be to materially affect it, the argument for the defendants would be of great weight. But the evidence does not show that the ringing of the morning bells is at all essential to the defendants' business, or that it is anything more than a convenience to them. The time for commencing work in the mill was at half after six o'clock in the morning, and the ringing of the morning bells was to aid the operatives in being at their work at that time. It may be convenient for the boarding-house keepers to be called at five o'clock, and for the defendants' operatives to be called at six o'clock, and to be summoned to the mill at half after six o'clock; but the evidence wholly fails to show that there are not other and equally effective methods

Birmingham, and that this circumstance must be taken into consideration in determining the question of the plaintiff's right to an injunction.

"I say the plaintiff's right, rather than the rights of those other members of the community on whose behalf the information is exhibited, because, as regards the latter, there may be circumstances to be taken into consideration which do not affect the question so far as it regards the plaintiff. There are cases at law in which it has been held, that, where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience to the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, the question is simply whether he has those rights, and if so, whether the court, looking to the precedents by which it must be governed in the exercise of its judicial discretion, can interfere to protect them.

"Now, with regard to the question of the plaintiff's right to an injunction, it appears to me, that, so far as this court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. The rights of the plaintiff must be measured precisely as they have been left by the Legislature. I am not sitting here as a committee for public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to Birmingham only, but to the whole of England—that is not my function. My function is only to interpret what the Legislature (the proper body to which all such arguments should be addressed) has considered necessary for the town of Birmingham. The town of Birmingham is to have neither more nor less than the Legislature has thought necessary for its protection. The plaintiff's rights are neither more nor less than the Legislature has thought it proper to leave him. And the question, whether the town of Birmingham is concerned, or whether, as in the case of *Delarue v. The Aldershot Deodorizing Manure Company*, the defendants are carrying on these operations for their own profit, is one which it is entirely beside the purpose to argue in this court.

"Now, the plaintiff's rights are these: He has a clear right to enjoy the river, which, before the defendants' operations, flowed unpolluted—or, at all events, so far unpolluted that fish could live in the stream and cattle would drink of it—through his grounds, for three miles and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and

of accomplishing the result which will not interfere with the rights of the plaintiffs. The custom in other places cannot affect the rights of the plaintiffs. The question is, largely, what is reasonable under the circumstances peculiar to the case. The defendants have adopted a certain method for producing a result subordinate in their business; they thereby do damage to the plaintiffs. If that method is so necessary to their business that it is reasonable that they should use it, notwithstanding the damage it does to the plaintiffs, then it is reasonable that the plaintiffs should suffer the damage, or obtain an indemnity by an action at law. But it is for the defendants to show that their act is, under all the circumstances, reasonable; and we think that the evidence warranted the judge before whom the case was fish, which were accustomed to frequent it, may not be driven elsewhere. He is entitled to the full use and benefit of the water of the river just as he enjoyed them before the passing of the Municipal Act, unless there be in that Act something which says he is not to enjoy them any longer. That is the only question I have to try, and when I have tried that question I arrive at the measure of the rights of both parties.

"As regards the discretion the court should exercise where such rights exist ; if the plaintiff finds the river so polluted as to be a continuous injury to him—if, in order to assert his right, he would be obliged to bring a series of actions, one every day of his life, in respect of every additional injury to his cattle, or every additional annoyance to himself (not to mention the permanent injury which he would sustain in having the water—which, as it passes along the course of his land, is his property—so damaged that he cannot use it), then the court will properly exercise its discretion by granting an injunction, to relieve him from the necessity of bringing a series of actions, in order to obtain the damages to which such continual and daily annoyance entitles him.

"In one respect, it is true arguments as to the discretion which the court should exercise in a case like the present, may very properly be addressed to it, viz., that before granting an injunction compelling the sudden stoppage of works like these, inasmuch as such an injunction might produce a considerable injury, the court, by way of indulgence, would afford the defendants every conceivable facility to enable them to remedy the evil complained of. But when I am told that they have already done their utmost and spent all their money in endeavoring to remedy that evil, and that now, in order to discharge the duties which the Act has imposed upon them, they have no alternative but to override the rights of private individuals, the answer is this : If they have not funds enough to make further experiments, they must apply to Parliament for power to raise more money. If, after all possible experiments, they cannot drain Birmingham without invading the plaintiff's private rights, they must apply to Parliament for power to invade his rights ; and if the case be one of such magnitude as it is represented to be, Parliament, no doubt, will take measures accordingly, and the plaintiff will protect himself as best he may.

"As regards the plaintiff's rights, therefore, the only question I have to consider is, whether the nuisance has been created by the act of the defendants ; and I cannot hesitate to say that it has." Sir W. Page Wood, V. C., in Attorney-General *v.* Council of Borough of Birmingham, 4 K. & J. 525, 538-541.—ED.

heard in finding that the ringing of the bell before the hours of six and one-half o'clock in the morning was not necessary or reasonable.

Decree affirmed.

N. Morse & E. W. Hutchins for the defendants.

C. G. Davis for the plaintiffs.

RICHARD HENNESSY v. CYRUS P. CARMONY ET UX.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM, 1892.

[*Reported in 50 New Jersey Equity Reports 616.*]

ON bill to restrain nuisance. Final hearing on the pleadings and oral proofs.

Mr. John W. Wartman for the complainant.

Mr. Samuel H. Grey for the defendants.

PITNEY, V.C. The object of the bill is to restrain a private nuisance.

The complainant is the owner of a small lot of land, about eighteen feet front and rear by about ninety-six feet deep, in the city of Camden, fronting on the west side of South Eighth Street, about midway between Spruce Street on the north and Cherry Street on the south. Upon this lot is situate a small dwelling-house, composed of a main or front part of brick about fifteen feet front by thirty feet deep, two stories high, leaving a passage-way of three feet on the northerly side, and having a wooden extension or kitchen, about ten by thirty-five feet, two stories high, in the rear. The rear of this structure is thirty-one and a half feet from the rear line of the lot. The ground lying to the north and west of this lot is owned by the defendants, or one of them, and is used for a dye-works for coloring cotton and other materials. In the process of dyeing it, of course, becomes necessary to dry those materials, and in order to hasten this process use is made of two machines, called in the evidence "whizzers," into which the wet material is placed, and which, by being revolved at great speed, drive out the water by centrifugal force. These machines are driven by two small engines attached to them directly, without intermediate gearing, so that the engines must make the same number of revolutions as do the whizzers, and the more rapid the revolution, the more rapid the process of drying. The principal subject of litigation was as to the effect upon the complainant's premises of these machines.

[The discussion of the evidence is here omitted.]

The serious and troublesome question in the case is as to whether the vibration established is of such a degree as to entitle the complainant to the aid of this court.¹

¹ So much of the opinion as relates to this question has been omitted.—ED.

The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country limiting the injured party to such remedy must result in giving the wrong-doer a power not permitted by our system of constitutional government, viz., to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely.¹

Several matters have at various times and on various occasions been held to stand in the way of granting an injunction in this class of cases. The principal one is what may be called the "*de minimis*"—"balance of injury" and "discretion" doctrine. It has been said, and held on some occasions, that where the injury to the complainant by the continuance of the nuisance is *small* and the injury to the defendant by its discontinuance is *great*, the court will consider that circumstance, and if the *balance* is greatly against the complainant will, in the exercise of a sound *discretion*, refuse the injunction and leave the complainant to his remedy at law. As instances in which this notion has been advanced in this State may be cited *Quackenbush v. Van Riper*,² *Van Winkle v. Curtis*,³ *Railroad Company v. Prudden*,⁴ in the court of errors and appeals; and in the later case of *Demarest v. Hardham*.⁵

The two cases in 2 Gr. Ch., as well as *Railroad Company v. Prudden*, were instances of interlocutory applications, and distinguishable on that ground; and further, in *Railroad Company v. Prudden*, the injunction was dissolved on the express ground that the complainant's right was not clear. And ⁶ the learned judge says: "The defendants will not occupy, with the proposed track, any of the complainants' lands. For the contingent and consequential damages he may suffer from any unlawful interference with his enjoyment of his property, he has his remedy by action at law, whenever, and as often as loss or damage ensues; and if the use of a railroad in front of his premises becomes a nuisance, or the aggression proves to be a permanent injury, without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance or for its removal. But a strong case must be presented, and the impending danger must be imminent and

¹ See *Ross v. Butler*, 4 C. E. Gr. 302.

² 2 Gr. Ch. 350.

³ 2 Gr. Ch. 422.

⁴ 5 C. E. Gr. 530.

⁵ 7 Stew. Eq. 469.

⁶ 5 C. E. Gr., at p. 540.

impressive, to justify the issuing of an injunction as a precautionary and preventive remedy." And in adverting to this opinion in *Carlisle v. Cooper*,¹ the same learned judge distinguishes it from the case of a final hearing for the abatement of a permanent and continuous nuisance. *Demarest v. Hardham* was on final hearing, and while some expressions of the learned vice-chancellor there found standing by themselves may seem to hold that the granting an injunction on final hearing as part of the decree rests in the discretion of the chancellor, I think that, taking what was said on that topic as a whole, it does not bear that interpretation.

With regard to the insignificance of the injury to the complainant, it seems to me it cannot be taken into account if it be appreciable and such as would clearly entitle him to damages at law. That consideration was urged and overruled, and with it, as I think, the *balance of injury and convenience* notion above stated by the court of errors and appeals in *Higgins v. Water Co.*,² which is the latest expression by that court on this subject. At page 544 the learned chief-justice deals with it, and finally disposes of the doctrine that in such cases the court will consider and balance the conveniences, and, if that balance be greatly against complainant, leave him to his remedy at law by repeated suits for damages. He uses this language :

"The next position taken in behalf of the defendant is, that even if the subtraction of this water is to be held to be wrongful with respect to the complainant, still a court of equity will not give relief by way of injunction, but will leave the parties injured to their remedy at law.

"If this were an application for a preliminary injunction it is clear that an objection of this kind should prevail, for the act which the defendant threatens to do is obviously not of a character to inflict any irreparable injury. But after a court of equity has entertained a bill, and, instead of sending the case to a trial at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly would be a result much to be deprecated, if, at such a stage of the controversy, it was the law that the chancellor were required to say to such a complainant, 'Your right it clear; if you sue at law you must inevitably recover, and after several recoveries, it then will be the duty of this court, on the ground of avoiding a multiplicity of suits, to enjoin the continuance of this nuisance; still you must go through the form of bringing such suits, before this court of equity can or will interfere.' In those cases in which, to the mind of the chancellor, the right of the complainant is clear, and the damage sustained by him is substantial, so that his right to recover damages at law is indisputable, and the chancellor has considered and

¹ 6 C. E. Gr. 584.

² 9 Stew. Eq. 538, at p. 541.

established his right, I think it not possible that any authority can be produced which sustains the doctrine contended for by the counsel of the defendant. For an example of such a proceeding we are referred to the case of Earl of Sandwich *v.* The Great Northern Ry. Co.,¹ but the authority is not relevant to the point, for the vice-chancellor expressly states that the complainant had suffered no damage. Speaking of the complainant, he says: 'What injunction is he entitled to? Is there any damage done to him? It is not pretended that there is any damage done to him.' This case, therefore, belongs to that class before referred to, where an abstraction of water has been made in a reasonable manner by a riparian proprietor, and where such abstraction does not operate to the detriment of other proprietors, and, as I have already stated, under such circumstances no wrong is done if the transaction be measured either by the rules of law or of equity. But in the present case, if the injunction be refused, it must be refused in the presence of the facts that there has been a diminution of this stream to the substantial detriment of the complainant, and a judgment on final hearing to that effect, so that a recovery would follow as a matter of course if suits at law should be brought. Under such circumstances of fact, has a court of equity ever promoted such useless litigation? It is impossible to conceive what benefit would result to either of the litigants from such a course. If this water company is doing a legal wrong, injurious to the complainant, such wrongful conduct must, if persisted in, either now or hereafter, be restrained in equity. After the rights of these parties have been settled in this court, suits at law, founded in this diversion of this stream, would be mere assessments of damages. Judgments in such actions, as a matter of course, must pass in favor of the complainants. To be prohibited, therefore, from doing the wrongful act which must lead to such results, cannot be regarded, with respect to the defendant, as anything inequitable. Nor, under such circumstances, can a court of equity rightly withhold its hand on the ground of any supposed inconvenience to those who are the customers of this company. In a similar situation the English chancellor refused to listen to such an appeal. Such an appeal was made in the case of Broadbent *v.* Imperial Gas Co.² The complaint was, that vegetables growing in the market-garden of the complainant were injured by the gas of that company, and when the argument was pressed that this injury was slight in comparison with the benefits conferred by the company on the public, and that on that account this court would not exercise its power to restrain the manufacture of the gas, Lord Cranworth uses this strong language. He says (at p. 462): 'If it should turn out that the company had no right so to

¹ L. R. (10 Ch. Div.) 707.

² 7 DeG., M. & G. 436.

manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on.' He further remarks, 'but unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the vice-chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas.' "

This seems to me to settle the rule in this State.

The case of *Broadbent v. The Gas Co.*, so cited by the learned chief-justice, was affirmed on appeal, as reported in L. R. (7 H. L. Cas.) 601. At page 615 Lord Kingsdown uses this language: "It is said that the balance of inconvenience is so great against granting an injunction that it ought not to be done; that in one view of it, it may stop these large and expensive works to the great injury of the public, while, on the other hand, the only inconvenience to which the plaintiff in the suit will be subjected, is the inconvenience of the trifling damage, it is said (*but be it trifling or large makes no difference in principle*), that he may sustain from time to time for which he may recover compensation by action."

In this case there had been an action at law brought to trial before Lord Chief-Judge Jervis, and so trifling did the action appear that the chief-justice is said by Lord Cranworth¹ to have said, "with his usual keenness, that it was a most ridiculous action."

And I desire here for myself to say that I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the "discretion" of the chancellor, as I understand the force of that word in that connection. If by "discretion" is here meant that the judge must be discreet, and must act *with* discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less. And that is the sense in which I understand the word is used in *Demarest v. Hardham*. But if the word "discretion" in this connection is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, *at* his discretion, without the

¹ 7 DeG., M. & G. 445.

restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right. For instance, in *In re Anderson*,¹ the question was whether a fund belonging to an infant should be transferred from one guardian to another, and it was held that its transfer rested in the discretion of the chancellor; and other cases are there cited. So with the question whether or not an issue should be framed by the chancellor to try a question of fact. That was declared by the court of errors and appeals, in *Carlisle v. Cooper*,² to be a matter resting in the discretion of the chancellor. And so with the issuing of interlocutory injunctions where no property right is immediately affected.

I have taken the trouble to examine many of the cases which seem to hold more or less the contrary of what I understand to be the rule laid down by the court of errors and appeals in *Higgins v. Water Company*, and find most of them distinguishable. The majority of them are rulings upon preliminary injunctions, where the right was not yet settled, or where the injury was not a continuing one and the remedy at law ample, or, if on final hearing, there was something inequitable in the complainant's conduct or case which would amount to a defence in equity to an action at law.

And of the English cases, it is proper further to observe that some of them gave damages, instead of an injunction, under the authority of the acts of Parliament for that purpose, called Lord Cairn's and Sir John Rolt's acts. The giving of damages for continuing nuisances is quite within the omnipotent power of Parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, as before remarked, that course is forbidden. I think the language of Lord Cranworth, quoted by the learned chief-justice in *Higgins v. Water Company*, applies with increased force in this country.

While the "balance of injury" notion has found frequent place in many English cases, the later and best considered of them put the rules governing courts of equity in such cases upon their true ground. *Clowes v. Staffordshire Works*,³ *Wilts v. Water Works*,⁴ *Goodson v. Richardson*,⁵ are examples. This last was a case of an injury to a bare right of property without any actual damage. Defendant had laid a water-main in a public street, the fee of which was in the complainant, and Lord Selborne held he was entitled to a mandatory injunc-

¹ 2 C. E. Gr. 536.

² 6 C. E. Gr. 576.

³ L. R. (8 Ch. App.) 125, 142, 143.

⁴ L. R. (9 Ch. App.) 451.

⁵ 9 Ch. App. 221.

tion compelling it to remove it. In the course of his judgment he uses this language.¹

There was, in the case in hand, no contention that the neighborhood here in question was ever given up by common consent to mechanical or manufacturing purposes. It seems to be one, mainly, of cheap residences, and retail shops. The language of Chancellor Zabriskie in *Ross v. Butler*,² is apt.³

Looking at the instances in which a court of equity has granted relief in cases like the present, we have, in this State, the case of *Demarest v. Hardham*, *supra*, in which the report shows a vibration probably somewhat greater than that shown by the evidence in this case. There the parties occupied adjoining buildings whose walls touched, and complainant manufactured harness and defendant operated steam printing-presses, and the vibratory force was not, as here, transmitted many feet through the earth. But I think the right of action at law is quite as clear in the case in hand as it was in *Demarest v. Hardham*.

In *Hurlburt v. McKone*,⁴ there was a vibration of the same character and degree, as near as may be, as that shown in this case—"the windows rattle in the casings, dishes and other like things standing on the table or shelves shake and jolt together." There was, however, in that case, an additional element of dense smoke, like that enjoined in *Ross v. Butler*, and there was proof that the health of a person living in the house was seriously affected by the general nuisance.

In *McKeon v. See*,⁵ the action was for both damages and an injunction under the New York code, and the trial judge found that the action of the defendant's machinery, used to saw marble, produced a jarring and shaking of complainant's two houses, injuring the same and amounting to a nuisance (the degree of vibration was not stated), and gave judgment for \$967—apparently for loss of rent—with an award of an injunction. The General Term of the Supreme Court struck out the judgment for damages, but made the injunction perpetual. The Court of Appeals affirmed this judgment.

A case similar in its circumstances to the last is *Goodall v. Crofton*.⁶ There the Superior Court of Cincinnati enjoined the operation of a marble and stone sawing and dressing mill because it caused a jarring and vibration of complainant's house on the adjoining prem-

¹ The learned Vice Chancellor here quotes that portion of the opinion of Lord Selborne found in the fifth and eighth paragraphs of his Lordship's opinion, pp. 616, 617, *supra*.—ED.

² 4 C. E. Gr. (at pp. 305, 306).

³ The language here quoted will be found on p. 802, *supra*, first and second paragraphs.—ED.

⁴ 55 Conn. 31.

⁵ 51 N. Y. 300.

⁶ 33 Ohio St. 271.

ises, and the Supreme Court, on error, reversed this judgment on the ground that in Ohio the court will not interfere by injunction when a party had an adequate remedy at law in damages, which they held he had in this case. I have already shown, to my own satisfaction at least, the vice of that position, and cannot but think that the judgment of the lower court was correct.

Several other instances of relief against noises combined with vibration are given in Wood on *Nuisances*;¹ and in section 769 *et seq.* he treats of the remedy in this court.

It was said in the Ohio case, and it was argued here, that if this court is to enjoin a vibration of this character, then it must also enjoin the passage of vehicles on the street which shake the dwellings of the adjoining houses. But the case is quite distinguishable. A man builds his house on the street subject to the right of the public to pass upon it with all its annoyance of noise and jar from passing vehicles. This right of passage is a public necessity and benefit, as well as an advantage to the dwellers thereon, and where the land has been taken by condemnation proceedings the injury, if any, to result from its proximity to the street is presumed to have been taken into consideration. Where it has been dedicated of course there can be no cause of action.

Another objection taken was, that if the fact that the vibration as felt in this case is due to the presence of an underlying layer of quicksand, then the defendant should not be held responsible for it. I am unable to discover any strength in that position. I do not see how the fact that nature has provided a very convenient medium through which my neighbor may injure my property should be held to give him the right to injure it.

Nor do I think that the presence of this quicksand renders it impracticable for the defendant to remedy the nuisance without stopping his works. Captain Ward suggests that he should drive piles for a foundation to his machines. There was no proof as to whether it was impossible to reach solid ground with masonry, but it seems to me probable from the evidence that there will be no difficulty in so doing, and that, at a comparatively trifling expense, the defendant may so arrange matters that his neighbors will not be annoyed by his machinery.

The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court.

The injury, to be actionable, must be sensible and appreciable, as dis-

¹ §§ 553, 556.

tinguished from one merely fanciful, and in a case like this I assume, for present purposes, that it must have the effect of rendering the premises less desirable, and so less valuable for ordinary use and occupation. Now it seems to me that a vibration that causes the windows and doors of a house to rattle in their casings, and dishes on the shelves to rattle and move on one another, and the walls to crack, and is distinctly felt by persons in the house, would have such effect, and is therefore actionable; while smoke and noise might have a similar effect in rendering the house less desirable without being actionable, because the degree of discomfort would not be sufficiently great to reach the standard—if, indeed, any standard has been established—applied to that class of injuries.¹

There is evidence tending to show that complainant made little or no complaint with regard to this vibration until about the time the bill was filed, when the invasion of his property rights by hanging the stay-wire over his land, by driving the filthy steam from the sewer into his kitchen, and the sprinkling of spray over his back yard, seemed to combine to exasperate him. This apparent acquiescence can only be used as evidence that the complainant did not consider the vibration as serious, but I think that is not sufficient in that regard to overcome the weight of the evidence that his house is injured.

I will advise a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate, and also from allowing the water and spray from the exhaust of his engines to come on to the complainant's lands.

ERASTUS CORNING AND JOHN F. WINSLOW, RESPONDENTS,
v. THE TROY IRON AND NAIL FACTORY, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 20, 1869.

[*Reported in 40 New York Reports 191.*]

THIS action was brought to obtain a perpetual injunction against the defendant, restraining it from diverting the waters of a portion of the Wynant's kill, in the city of Troy, along the land of the plaintiffs, and to compel the defendant to restore to their natural bed or channel, the waters of the kill, diverted by the defendant. The complaint also asked for damages sustained by reason of the diversion of the water, and for general relief.

The premises, where the controversy arose, are part of a farm of

¹ See *Walter v. Selfe*, 4 DeG. & S. 318; 20 L. J. Ch. (N. S.) 434; 15 Jur. 416; *Ross v. Butler*, 4 C. E. Gr. 294, 299, 306

125 acres, conveyed, in 1788, by a warranty deed, without exception or reservation, from Stephen Van Rensselaer to Jeremiah Lansing. In 1789, Jeremiah Lansing conveyed to David De Forest the same premises, and by the same description, with an exception in these words:

"Excepting, and always reserving, one acre of land on the south side of the creek, and adjoining to the creek, where the line crosses the said creek, unto *Stephen V. Rensselaer*, Esquire, proprietor of the manor of Rensselaerwyck, and to his heirs and assigns forever."

The heirs of David De Forest (or Defreest, as the name was afterwards written), in 1852, conveyed to the plaintiffs, what is called, in the case and in the opinions, the seven acre lot, and which is a part of the farm of 125 acres conveyed from Van Rensselaer to Lansing, and from Lansing to De Forest.

This seven acre lot lies on the north side of the Wynant's kill, and includes within its outer boundaries, as described in the plaintiffs' deed, the acre of land excepted in the deed from Lansing to De Forest, and then excepts it in the identical language of the original exception.

At the place where the seven acre lot is located, the Wynant's kill takes a bend to the north, in the shape of a horse shoe, and the excepted acre lies within the bend, on the south side of the creek, the seven acre lot, on the opposite side of the creek, surrounding it on the easterly, northerly, and westerly sides. The general course of the creek is from the east, westerly, to the Hudson River.

Prior to the incorporation, in 1813, of the defendant, John Converse preceded it in possession, and thereafter was the principal manager of the incorporation, and his rights and interests were treated in this case as those of the defendant.

In 1809, Converse leased from David De Forest one and three-fourth acres (part of the seven acre lot), for twenty-one years, the nature and extent of which lease is fully discussed in the opinion of Judge Woodruff.

From about that time, Converse and the defendant have been in occupation of the excepted acre, and other land south of the creek, and on the trial, the defendant claimed to own the same. The only paper title produced, to the acre, however, was a quit claim from Wm. P. Van Rensselaer to the defendant, in 1847. While Converse held this lease, a dam for the use of a shovel factory was erected, crossing from the excepted acre to what is now the plaintiffs' land (the seven acre lot), and the shovel factory was erected on the excepted acre. What is called the gun factory lot is on the north side of the creek, above, and east of the seven acre lot of the plaintiffs, and this is also claimed by the defendant.

In 1817, the heirs of David De Forest leased to John Converse the seven acre lot (with the exception of the excepted acre) for the term of thirty-four years and nine months, ending the 1st day of February, 1852.

In 1839, the defendant then being in possession of the excepted acre, claiming to own it, and occupying the seven acre lot, under the lease to Converse, diverted the water of the kill or creek, from a point higher up, so as to use it in their manufacturing establishments, erected on the excepted acre, and restore it to the creek at a point below the lower or western boundary line of the seven acre lot. As a consequence, the water of the creek did not run in its natural channel at any part of its course between the seven acre lot and the excepted acre.

To make available the water thus diverted, the defendant, at about the time of the diversion, erected a water wheel, fifty feet in diameter, and other works, at an expense, sworn upon the trial to be nearly \$100,000. The facts, as to the assent of De Forest, one of the plaintiffs' grantors, to this diversion (which the defendant claims are an estoppel) appear in the judge's finding below.

In 1850 and 1851, the defendant, still holding the lease of the seven acre lot, which was to expire in 1852, made further improvements upon the excepted acre, putting in a wheel sixty feet in diameter, and erecting other improvements, at a gross expense of nearly \$100,000 more.

About four years after the expiration of the lease to Converse of the seven acre lot, the defendant continuing the diversion of the water, the plaintiffs, who had purchased the seven acre lot, brought this action.

The cause was first tried at Special Term, before Mr. Justice Wright, who dismissed the complaint, and from his decision the plaintiffs appealed to the General Term, which ordered a new trial. This decision of the General Term is reported in 34 Barb. 485. Upon a new trial, at the circuit, before Mr. Justice Ingraham, the complaint was again dismissed.¹

The plaintiffs again appealed to the General Term, which reversed the decision of the circuit and ordered a new trial.

This last decision is reported in 39 Barb. 311. From the order of the General Term it appeared that the reversal was upon questions of fact as well as of law. The defendant appealed to the Court of Appeals, from the order granting a new trial, giving the usual stipulation.

Upon the first argument in this court the court failed to agree upon a decision and a re-argument was had.

¹ The findings of Mr. Justice Ingraham have been omitted.—ED.

William A. Beach for the appellant (*John H. Reynolds* with him). *Amasa J. Parker* and *Charles E. Patterson* for the respondent.

GROVER, J.¹ While in possession under this lease,² in 1839, the defendant constructed an artificial channel for the stream, by which it was wholly diverted from the seven acres, and conducted across the excepted acre, and used upon, a large overshot wheel, constructed to operate the extensive machinery of the defendant. At this time the plaintiffs were the owners of six acres upon the stream, below the premises in question, upon which was extensive machinery, operated by them, by means of the water power of the creek, but having no interest in the seven acres. The plaintiffs drew down their pond at this time, to enable the defendant to excavate a tail race from its wheel to the bed of the stream. It is insisted by the defendant that this precludes the claim of the plaintiffs to have the stream restored to its natural channel, thereby causing a great loss to the defendant in respect to the operation of its machinery. The answer to this is, that the plaintiffs base their claim to such restoration upon their title to the seven acres, which they obtained, in part, in 1852, and the residue in 1856, and that it was known to the defendant at the time that the plaintiffs then had no interest therein. It was, therefore, not then in their power to affect any right appurtenant to the reversion in the seven acres, as against the then owners or those subsequently acquiring the title. It is further insisted by the defendant, that Defreest, one of the defendant's lessors, was precluded from requiring the restoration of the stream, by his assent to its diversion at the time it was made in 1839, and that if his right was thus cut off, no grantee from him could assert, under his grant, any better right thereto than he had. The conclusion is, doubtless, correct under the facts of this case, as the water was in fact diverted at the time Defreest conveyed to the plaintiffs. This was sufficient to put the plaintiffs upon inquiry as to any right, legal or equitable, of the defendant to make the diversion. Such inquiry would have led to information of the acts of Defreest, and the plaintiffs are, therefore, chargeable with notice of such acts. They are not, therefore, to be regarded as *bona fide* purchasers in this respect, but take the land subject to any legal or equitable right of diversion the defendant had, as against Defreest. It must, therefore, be determined what such right, if any, was as against the latter. The case shows that Defreest lived at the time in the immediate vicinity, was frequently at the

¹ A portion of the opinion discussing a question of title has been omitted. The concurring opinion of Woodruff, J., has also been omitted.—ED.

² The lease executed in 1817 by the heirs of David De Forest is here referred to.—ED.

place while the work was in progress, conversed several times with the managing agent of the defendant, expressed to such agent his opinion that the change would improve the water power, and would benefit his property in the vicinity. That he knew that the contemplated change and improvements would cause the expenditure of a large sum of money, and that while these large expenditures were being incurred, made no objection to the diversion of the water. It is claimed that he must have known, from the amount of the expenditure and the character of the improvement, that the diversion was designed to be permanent. The latter fact is strongly controverted by the plaintiff, but, in considering this question, I shall assume its truth. It is insisted by the defendants that these facts constitute an estoppel upon Defreest from asserting any claim to a restoration of the water to the prejudice of the defendant. The answer to this position is, that the defendant at the time had not only the possession of the seven acres, and the full control of the water belonging thereto, but, also, the right of possession and control for the unexpired term of the lease, a period of thirteen years, and that during that time Defreest had no right to object to any use of the stream by the defendant, except such as worked an injury to the reversion, which the diversion of the stream, during that period, clearly would not. That the defendant, at the time, knew that upon the expiration of the lease their right to divert the water would cease under it, just as well as Defreest did, and there was no pretence of any other claim by the defendant to any other right to divert the stream from the seven acres. The defendant was not, therefore, in any sense, misled or deceived as to its right by anything done or omitted by Defreest. The case does not, therefore, come within the principle of the class of cases cited by defendant's counsel, holding that when one, in the belief that he has title, makes improvements with the knowledge and encouragement of the owner, such owner shall be estopped from asserting his title to the prejudice of the party having made such improvements. The estoppel is based upon the fraudulent conduct of the owner. There is no such reason applicable to Defreest. He was not estopped, and it follows that the plaintiffs, as his grantees, are not. There is no pretence of an estoppel upon the co-tenants of Defreest, who are also grantees of the plaintiffs. It is insisted by the defendant, that the plaintiffs acquired no right to a restoration of the stream, under their deed, although such right existed in their grantors, for the reason that the diversion was prior to the grant, and that the defendant was holding the stream adversely at the time. The land was at the time in the possession of the grantors. There is no question but the title to that passed by the grant to the

plaintiffs, with everything incident or pertaining thereto. The right to the flow of the stream in its natural channel was an incident to the land.¹ 1st R. S., § 147, p. 739, declares that grants of land shall be void when such lands shall, at the time, be in the actual possession of another, claiming under a title adverse to that of the grantor. This applies to an adverse holding of land, and not to such holding of some right appurtenant thereto, which passes with the land. The purchaser of the land is entitled to such appurtenant rights.² It follows that the plaintiffs had the right to have the stream flow in its natural channel along the seven acres purchased by them. For a violation of this right by the defendant, they had a right of recovery, without proof of actual damage, irrespective of any use of the water power by them.³ It follows, that the plaintiffs were entitled to recover damages of the defendant for the wrongful diversion of the stream. It may now be assumed as settled that the plaintiffs could, in the same action, obtain all the relief to which the facts entitled them, arising out of the diversion of the water, whether such relief was legal or equitable, or both.⁴ They were clearly entitled to recover damages, and the judge, therefore, erred in dismissing the complaint, and the General Term were right in reversing the judgment and ordering a new trial. This leads to an affirmance of the order appealed from, and to final judgment against the defendant; but whether such judgment shall be for damages only, or in addition thereto, shall award a mandatory injunction for the restoration of the water to its natural channel, remains to be considered. It is urged by the defendant that the latter ought not to be included, for various reasons, the principal of which are, that it would be productive of great injury to the defendant, and be of little benefit to the plaintiffs. The former fact is established by the evidence. The latter rests upon the hypothesis that, inasmuch as the plaintiffs have not heretofore used the power and have made no preparations to use it, they do not desire it for use. The facts show that its restoration would give a power sufficient for a grist-mill grinding fifteen bushels per hour, or a cotton factory with forty looms. The question then comes to this, whether the defendant, who has wrongfully diverted from the plaintiffs a stream affording such a water power, shall be permitted to continue such wrongful diversion, and thus to deprive the plaintiffs of what is clearly theirs without their assent, upon the ground simply

¹ 3 Kent's Com. 439.

² Mason *v.* Hill, 4 Barn. & Adolphus.

³ Tyler *v.* Wilkison, 4 Mason 400; 3 Kent 539; Adams *v.* Burney, 25 Vermont 225; Embury *v.* Owen, 6 Exch. 368; Townsend *v.* McDonald, 2 Kernan 381.

⁴ Code, § 167.

that its restoration would be a great damage to it. In other words, that by its continuance wrongfully to appropriate to its own use the property of the plaintiffs, it derives a much greater benefit than the plaintiffs could by being restored to their own. The bare statement of the question would seem to suggest the only proper answer. The very idea of justice is to give to each one his due. The use of the natural flow of the stream is the due of the plaintiffs, and to justify withholding it from them requires some better reason than loss to the wrong-doer consequent upon its restoration. It is insisted that the equitable right of restoration has been lost by delay. The statute of limitation, either at law or in equity, has not attached so as to bar the right. The case has, therefore, no analogy to that class of cases where equity has refused relief upon the ground that the legal remedy was barred by the statute. The defendant has expended no money upon improvements since the expiration of the lease, consequently the principle of the cases holding that where, during the delay of a party in asserting his right, expenditures have been made in improvements, equity will not interfere, do not apply. *Lewis v. Chapman*¹ is one of this class. The plaintiff sought to restrain, by injunction, the publication of a work of which he was the owner of a copyright. It appeared that he had lain still for six years and upwards and seen the defendant expending his money in printing the work, etc., etc.; upon this ground, equity refused to relieve the plaintiff. There are numerous cases of this description found in the books, but they all rest upon the same principle. All there is of the delay in this case is, that the plaintiffs finding the defendant using their water power have permitted it to continue such use for about four years. Clearly this indulgence furnishes no reason for the refusal of equity to aid the plaintiffs in the recovery of their legal rights. It is insisted by the defendant, that equity ought not to interpose in behalf of the plaintiffs, for the reason that they do not want the water power, afforded by the stream, for use. This is a mere assumption. It is true, they have not heretofore used the power, perhaps, for the very good reason that they have not had the ability to use it, on account of the defendants withholding it from them. It is said that the plaintiffs have erected no machinery for that purpose. This is true. The plaintiffs have not constructed machinery to rot while litigating with the defendant for the recovery of the stream. But if the facts claimed were clearly established, it would not protect the defendant in wrongfully withholding the stream. No man is justified in withholding property from the owner when required to surrender it, on the ground that he does not need its use. The plaintiffs may do

¹ 3 Beavan.

what they will with their own. Upon established principles, this is a proper case of equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream, in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought, is established by authority as well as principle.¹ It is further insisted by the defendant that equity will not interpose until the right has been settled at law. That, formerly, was the universal rule, where there was any substantial doubt as to the legal right.² But that rule no longer prevails in this State. We have before seen that all the relief to which a party is entitled, arising from the same transaction, may, under the Code, be obtained in one suit. Besides, there is no doubt as to the legal right in the present case. My conclusion is, that the plaintiffs are entitled to the aid of equity in restoring the stream to its natural channel, and this whether the loss to the defendant is more or less. The defendant was bound to restore the stream upon the expiration of the lease, equally with the land. The order appealed from should be affirmed, and final judgment given against the defendant for the damages sustained by plaintiffs, and that they restore the stream to its natural channel. It is not important to determine, in this case, whether the plaintiffs' boundary is the centre of the stream, or the south bank; I have not, therefore, discussed that question.

MURRAY, J., also read an opinion for affirmance, but for limiting the plaintiffs' recovery to damages, and releasing the defendant from its stipulation for judgment absolute in case of affirmance, and for ordering a new trial. He thought the circumstances of great loss and injury to the defendant, and slight advantage to the plaintiffs from a restoration, the assent of the plaintiffs' grantor to the building, by the defendant, of these permanent and expensive works during

¹ *Webb v. The Portland Manufacturing Co.*, 3 Sumner 190, and cases cited; *Tyler v. Wilkison*, 4 Mason 400; *Townsend v. McDonald*, 2 Kernan 381; ² *Story's Equity*, §§ 901, 926-7; *Angell on Water Courses*, §§ 449-50.

² *Gardner v. The Trustees of Newburgh*, 2 John. Chan. 162.

the lease, and the delay of the plaintiffs, after the expiration of lease, to bring suit, rendered an injunction improper.

HUNT, Ch. J., LOTT and DANIELS, JJ., concurred with GROVER and WOODRUFF, JJ., for affirmance and an injunction. DANIELS, J., was also inclined to the opinion that the plaintiff had established a title to the whole bed of the stream. MASON and JAMES, JJ., concurred with MURRAY, J., against an injunction.

Order of General Term affirmed and judgment final ordered for the plaintiffs for damages to be assessed, and a mandatory injunction that the defendant restore the water, within twelve months from the entry of judgment.

JAMES GALWAY, RESPONDENT, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 6, 1891.

[*Reported in 128 New York Reports 132.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John F. Dillon and Julien T. Davies for appellants.

John E. Burrill and George Zabriskie for respondent.

RUGER, Ch. J. This is one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth Avenue in the city of New York adjacent to plaintiff's property, thereby unlawfully interfering with it.

This property consisted of five vacant lots, extending about one hundred and twenty-five feet along the easterly side of the avenue, between Fifty-seventh and Fifty-eighth Streets, and was acquired by the plaintiff by purchase in and previous to 1871. The defendant, the Metropolitan Elevated Railway Company, commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of this action, in 1889, it has, either by itself, or through its lessee, The Manhattan Railway Company, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises in Sixth Avenue. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their consent to its construction previous to the commencement of this action.

The plaintiff complained that by reason of the operation of such railroad, in impairing the easements of light, air, and access to his premises, he had been damaged, and demanded judgment for such damages, as well as a perpetual injunction against the defendants from further operating and maintaining their railroad in front of his premises. A trial was had at Special Term and the court declined to award pecuniary damages to the plaintiff, but rendered judgment granting the relief by injunction, unless the defendant should pay to the plaintiff, within a limited time, the sum of twenty thousand dollars as the depreciation of the value of the premises caused by the railroad, and upon such payment being made required the plaintiff to execute to the defendant a conveyance of the easements. The depreciation in the value of plaintiff's property by reason of the erection and maintenance of the railroad was found by the trial court to be twenty thousand dollars, and the evidence supported that finding. It was also found that the plaintiff saw the railroad in the course of construction in front of his premises, and, from time to time, saw what defendants were doing in respect thereto, and occasionally, as a passenger, rode upon it. He subscribed money to pay for counsel to prevent the erection of the road, but made no protest otherwise, and instituted no legal proceedings to enjoin its construction or operation prior to the commencement of this action. It was also found that after the commencement of this action, but before the trial, the defendants instituted proceedings for the condemnation of that part of the easements referred to which had been taken for the use of such railroad, and that such proceedings were pending undetermined at the time of the trial.

The defendants requested the trial court to find the following propositions of law: First. "That this action is barred by the Statute of Limitations"; and Second. "That plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger," and that he is estopped from maintaining the action. The court refused to find as requested, and it is conceded by the defendants that the exceptions to such refusal raise the only questions to be considered on this appeal.

It is claimed that the ten years' Statute of Limitations commenced to run against an equity action from the time the plaintiff was first entitled to commence such action, and that period having elapsed, that the plaintiff was barred from maintaining such action by section 388 of the Code of Civil Procedure. This section is the general statute adopted in the Code as a precautionary measure, to cover cases inadvertently omitted or otherwise unprovided for.

The general right of an abutting owner on a public street to recover

damages for an unlawful invasion of his easements by the erection and maintenance of an elevated railroad in the street adjoining his premises is not contested by the defendants. Nor is the liability of the defendants to make compensation to the plaintiff for the injury inflicted upon his property by the construction and operation of their railroad disputed, or his right to maintain successive actions at law to recover damages for the injury to his easement; but it is claimed that he has lost the right to proceed in equity, not only by reason of the Statute of Limitations, but also by virtue of an equitable estoppel arising out of the alleged acquiescence in the admitted trespasses.

The case, therefore, involves the question how far, if at all, the owner has forfeited his rights in his property by reason of his alleged laches and inaction during the period of eleven years intervening between the construction of the road and the commencement of the action.

We think it would be impossible to sustain this appeal without unsettling the established law of the State. It is, in effect, an effort to exempt actions in equity from the operation of the well-settled principle that trespasses upon real property effected by an unlawful structure or nuisance, are continuous in their nature and give successive causes of action from time to time, as the injuries are perpetrated. The questions raised are answered by elementary principles established in this State by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure create separate causes of action barred only by the running of the statute against the successive trespasses, and the further principle that no lapse of time or inaction merely on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages.

It may be that there is no case where the precise question as to the application of section 388 to such causes of action has been directly decided in this State, but the rule follows as a logical conclusion from the cases, and it affords a strong argument against the appellants' theory that, in the numerous cases in this State in which the question has been involved, the point has never before been taken by counsel for the trespasser in any case in this court.

It is not claimed here that the plaintiff has ceased to be the owner of the easements impaired, or that any other party has acquired title thereto, but it is argued that he has lost the right to employ the equitable power of the courts by reason of his neglect to demand it

within ten years from the time when a cause of action accrued. Thus, although the wrongful acts may be continued and the owner subjected to irreparable injury, and his legal remedy may be either inadequate or require that it should be sought through repeated and numerous actions at law, it is contended that the jurisdiction of an equity court shall be arrested at the very time when, in the interest of the public, the exercise of its power becomes the most apparent and necessary. This claim, we think, is altogether untenable. The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guarantees that no person shall be deprived of life, liberty, or property without due process of law, or have his property taken for public use without just compensation, and it necessarily follows that so long as such person continues to be the owner of property and liable to be injured in respect thereto by the unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation applicable to his legal right, or before adverse possession has barred his title to the property injured.¹

The cause of action, both at law and equity, in such cases arises out of the trespasses committed, and is based on the ownership of the property upon which the injuries are inflicted, and it is obvious that no cause of action can be barred while there is an outstanding legal cause of action for which the party has a legal remedy. The existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in respect to the subject-matter.

The questions presented have been so frequently considered and decided in this court in analogous cases adversely to the contention of the appellants, that they should no longer be the subject of controversy or debate. The learning and ability, however, with which the counsel for the appellants have pressed their case before us, have induced us to treat the questions argued at greater length than would otherwise have been thought necessary or proper, and we, therefore, indicate briefly the general theory upon which this court has proceeded in the determination of like questions.

That theory is concisely expressed by Judge Earl in the case of Tallman.² It was there said that "When the defendant began

¹ *Uline v. N. Y. C. & H. R. R.R. Co.*, 101 N. Y. 98; *Arnold v. H. R. R.R. Co.*, 55 Id. 661; *Colrick v. Swinburne*, 105 Id. 503; *Tallman v. M. E. R.R. Co.*, 121 Id. 123.

² *Supra*.

to construct its railway in front of the plaintiff's lots, he could have commenced an action in equity against it and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way he would, at least in the theory of the law, have been indemnified for all the damage he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterwards, during his ownership of the lots, with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed and then bring successive actions to recover damages to his lots caused by the construction, maintenance, and operation of the railway."

In the Arnold case it was held that an easement to carry water in a trunk over the land of another "was such an interest in land as could not be modified or discharged save by conveyance in writing or by operation of law; that it was property within the meaning of article 1, section 6 of the Constitution, and, therefore, could not, nor could any portion of it be taken for public use without compensation," and "that this right of enjoying such easement was a continuous one, and the unlawful preventing its exercise a continuous injury, and that, therefore, the Statute of Limitations did not bar plaintiff's claim for the injuries sustained."

It is now the settled law of this State that no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property, and it is equally certain, we think, that an equity action for that purpose alone cannot be sustained.¹

Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim.

When the trespass is of such a character that it may be discontinued at the option of the wrong-doer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrong-doer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise the wrong-doer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner and

¹ Uline *v.* N. Y. C. & H. R. R.R. Co., *supra*; Pond *v.* Me. Elevated R. Co., 112 N. Y. 187.

thus violate the rule of law, as well as the plainest principles of equity.

Upon settled principles a court of equity had unquestioned jurisdiction by reason of the continuance of the legal right and the inadequacy of the legal remedy to render the judgment pronounced in this case by the trial court.¹

That successive causes of action have accrued to the owner for each day's maintenance and operation of the railroad structure adjoining his premises is undisputable, and that he is entitled to recover some damage for each trespass, even though it be nominal only, is equally undeniable.²

The plaintiff may delay his action and join together such causes of action as have not then outlawed, or he may bring an action daily and recover such damages as he can establish.³

In the case of unoccupied lands these damages may be small, but by delay the owner may lose them altogether, and in the meanwhile his toleration may be laying the foundation of an adverse claim to the property itself, and thus be the cause to him of irreparable injury. While it is indispensable to the protection of his rights that he should assert them before his right is barred, in such case it may not be to his interest to do so as often or as promptly as when his damages are large and immediate, but no bar from laches is available unless the legal action is barred.

The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance and must, from the nature of the case, continue so long as that necessity exists.

The existence of either of the grounds of equity jurisdiction referred to, is sufficient to maintain an action, but they, in fact, are all present here and indicate the propriety of the judgment appealed from.

It was said by Judge Earl in *Campbell v. Seaman*⁴ that "the right to an injunction, in a proper case, in England and in most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal, in a proper case, would be error to be corrected by a proper tribunal."

The lapse, therefore, of six years after a trespass has been committed upon real estate, bars not only the legal but also constitutes a practical defense to an equitable action founded upon the necessity

¹ *Henderson v. N. Y. C. R.R. Co.*, 78 N. Y. 423; *Tallman Case, supra*.

² *Colrick v. Swinburne, supra*.

³ *Baldwin v. Calkins*.

⁴ 63 N. Y. 582.

of numerous legal actions to obtain redress, because the right to such redress has as to such wrongs expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law but also in equity.¹

Section 388 of the Code finds its true interpretation when applied to causes of action founded upon equitable rights alone, or cases not specified in the general Statutes of Limitation.

It being conceded as to legal causes of action for trespass and nuisance, that the injuries thereby occasioned are continuous and arise from time to time as fresh trespasses are committed, it is difficult to see why the same principle should not apply with at least equal force and propriety to equitable actions. Indeed, it is obvious that it should be held to apply with greater reason to the latter, since otherwise the equity jurisdiction would be practically subverted. While the appellants' contention would permit the equity jurisdiction to be preserved for ten years, it precludes its exercise forever thereafter and leaves the evils of incessant litigation to harass the public for practically an unlimited period of time.

It would seem, therefore, that it is immaterial, either in equity or at law, whether the injuries done to the owner's property were originally intended by the wrong-doer to be perpetual and of a permanent character, or were of a temporary nature only and occasional in their operation. The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued.²

The defendants' chief contention is that the relief in equity as now given against elevated railroads for invasions of the rights of abutting owners in streets, is practically an action to recover permanent damages for such injuries, and that, therefore, the Statute of Limitations should commence to run from the time when any cause of action arose.

There would be some force in this argument were that the real character of the action, or if the equity courts had assumed to exercise the power of awarding damages on that theory, but we know of no instance in which they have done so in this State. The action here is neither in practice nor theory an action of such a character and by its fundamental rules, as well as the constitutional requirement that compensation for such property shall be assessed by a jury

¹ Uline Case, *supra*.

² Krehl *v.* Burrell, L. R. (11 Ch. Div.) 146; Henderson's Case, *supra*; Baldwin *v.* Calkins, 10 Wend. 170; Williams *v.* N. Y. Central R.R. Co., 16 N. Y. III.

or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone.¹

A court of law is the exclusive tribunal for the determination of such actions. We have been referred to no case in this State where an equity court has assumed the authority to render judgment for prospective damages against a wrong-doer, and, we think, in the nature of the jurisdiction of such courts, a suit brought for such a purpose alone is not authorized. To say, therefore, that an action in which the plaintiff has no legal right to demand permanent damages, and the court owes no legal duty to award them, affords the owner an adequate remedy for such damages, is to pervert the plain character of the action. While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time, or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages, or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party, and not as matter of right to the injured owner. As was said in the Henderson case: "Equitable relief is awarded, not as the defendant's counsel claims, by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorized use of the plaintiffs' property and forbear from any further interference with their rights."

Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him, or to suffer the judgment of the court to stand.

While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it, nevertheless, does no more than place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered imperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for

¹ Bradley *v.* Bosley, 1 Barb. Ch. 125; Morss *v.* Elmendorf, 11 Paige 277; Art. 1, § 7, Constitution.

his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection.

It furnishes no cause of complaint to the wrong-doer, that the court having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not.

A consideration of the cases generally in which equity courts have exercised the power of giving damages as an incident of the equitable relief granted, seems to be unnecessary in this case, as such courts in this State have not in this class of actions, so far as we know, assumed to exercise that power.

The cases cited by the appellants to sustain the authority of an equity court to award permanent damages to real property, were those of foreign jurisdictions where special statutes existed or those in which no constitutional provision requiring such damages to be assessed by a jury or commissioners were in force. Here such a requirement exists and the courts decline to assess such damages, but simply say to the corporations, you may escape the legal consequences of your conduct by complying with certain conditions; as, for instance, by paying the plaintiff a specified sum of money. This sum may represent the actual depreciation in the value of the plaintiff's property or the amount of damages already suffered, or any other arbitrary sum. The defendant, who has an option to pay it or not at his own will, cannot justly complain of the action of the court. The option is given to the defendants and not to the plaintiff. His remedy is confined to his injunction. The injury which results to the defendants, in case the option is not accepted, results from the judgment rendered by the court and not from their neglect to make payment. The expression, made use of in some of the cases, to the effect that "the only remedy whereby just compensation for the property taken can be compelled, is an action to restrain the continuous trespasses,"¹ means simply that an injured party can by that means secure the enjoyment of his property, unless the wrong-doers by making compensation in some form for the injury inflicted, acquire the lawful right to continue it. In this sense only they may be, not incorrectly, called actions to compel the payment of damages.

¹ *Pond v. Met. El. R. Co.* 112, N. Y. 186; Tallman Case, *supra*.

The defendants also urge, as a reason why the Statute of Limitations should bar this action, that otherwise they will be embarrassed in their efforts to secure a right by prescription. We ascribe but little weight to this suggestion. The law applies a period of limitation to actions for the public benefit. They are termed statutes of repose and are founded upon the maxim "*Interest reipublicae ut sit finis litium.*" They are not intended for the benefit of wrong-doers, and while the law tolerates and protects title acquired by prescription when clearly made out, it does not favor or encourage that mode of acquiring property.

We are, therefore, of the opinion that the right to bring an equity action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained if brought at any time so long as the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law.

But the defendants, failing to establish the bar of the Statute of Limitations, still insist that the affiliated principle of acquiescence constitutes a defense to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and, indeed, the claim is not seriously urged by the appellants. It is obvious that such conduct has never led the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them. From the inception of the enterprise to the present time, the claim that the defendants had a right to build their road in the streets of New York without compensating the abutting owners for the damages inflicted upon their property, has been uniformly denied and the defendants have continued the prosecution of their purpose regardless of their legal liability and in the face of strenuous opposition, with an apparent intention to wholly ignore the claims of such owners.

The judicial annals of the State are filled with the history of the litigations which have sprung out of the efforts of the elevated railroad companies to appropriate the property of the citizens of New York to the benefit of such railroads without compensation. In view of these facts, it is idle to claim that such companies have been induced in any respect to continue their enterprise in reliance upon the assumed acquiescence of the owners.¹

¹ *Boardman v. L. S. & M. S. Ry. Co.*, 84 N. Y. 181.

The building and completion of their road in this case occurred in the first half of 1878, and was completed before the numerous parties concerned could have been fully awake to the real consequences of the enterprise. So far as the permanent structure is concerned, their expenditures were all incurred within six months and while the parties were making earnest efforts to stay any expenditures.

The case is entirely destitute of proof showing the existence of any elements of estoppel, and the defendants are, therefore, driven to rely, in this respect, upon the mere inaction of the plaintiff to prosecute his claim. This claim comes with little grace from parties who have for a much longer period neglected to take proceedings to acquire the real ownership of the property required by them in the prosecution of their enterprise.

But this question we also think is governed by authority equally conclusive with that relating to the Statute of Limitations. The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other States, it can be said that here no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right, has been uniformly applied in this court.¹

In the case of Ormsby, as appears by the head-note, it was held that "the doctrine of laches and acquiescence as a bar to an action through lapse of time, finds its just application in respect to equitable rights only; as to legal rights, mere lapse of time before an action to enforce them, is of no moment, unless it comes up to the requirements of the Statute of Limitations."

In the Chapman case, this court held that the silence and inaction of the plaintiff while seeing the defendant construct sewers and spend large sums of money in completing a sewage system, which discharged the filth of the city into a stream belonging to the plaintiff, did not constitute a defense to an action for an injunction, no matter how long continued, unless accompanied by circumstances amounting to an estoppel.

¹ *Tallman v. Met. El. R. Co.*, *supra*; *Arnold v. H. R. R.R. Co.*, *supra*; *Broestedt v. S. S. R.R. Co.*, 55 N. Y. 220; *Campbell v. Seaman*, *supra*; *Ormsby v. Vt. Copper Mining Co.*, 56 N. Y. 623; *Haight v. Price*, 21 Id. 241; *Viele v. Judson*, 82 Id. 32; *N.Y. Rubber Co. v. Rothery*, 107 Id. 310; *Chapman v. City of Rochester*, 110 Id. 273.

It was held in *Haight v. Price*, "that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of a grant or of license."

Judge Earl, in the *Campbell* case, said. "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. . . . No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and, therefore, there was no acquiescence or laches which should bar the plaintiffs within any rule laid down in any reported case."

In *Viele v. Judson*, Judge Finch, in speaking of the cases where acquiescence had been held a bar, says: "In all of these the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And in all the party maintaining silence knew that some one was relying upon that silence, and either acting or about to act as he would not have done had the truth been told."

It was held in the *Broistedt* case that the possession by a railroad company of a highway under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil, and cannot be said to be adverse to him.

In the *N. Y. Rubber Co. v. Rothery*, the defendant had built expensive structures for manufacturing purposes and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery. It was claimed that the plaintiff, by her silence during the period when this work was going on, was barred of her action for damages. Judge Peckham, writing in the case, says: "In this there was no element of an estoppel; to constitute it the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or omission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct."¹

But we have already referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine, where a legal right is involved, and, upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere laches of a party, unaccompanied by circum-

¹ See also *McMurray v. McMurray*, 66 N. Y. 176.

stances amounting to an estoppel, constitutes no defense to such an action. Such is also the doctrine, generally, of the elementary writers.¹

The same general principle has also been held in England. In the case of *Fullwood v. Fullwood*,² Fry, Justice, says that "mere lapse of time unaccompanied by anything else has, in my judgment, just as much effect, and no more, in barring a suit for an injunction, as it has in barring an action for deceit."

And the head-note in *In re Maddever*³ reads: "That as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defense, as it had not continued long enough to bar his legal right; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law."

The Supreme Court of the United States have also laid down the same rule in the recent case of *Menendez v. Holt*,⁴ where Chief Justice Fuller, writing for the court, says: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired by that negligence the right to cut down the remainder."⁵

Even in cases where laches have been allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case.⁶

There is nothing in the history of this case which induces us to suppose the court committed any error in the exercise of their discretion in granting the injunction appealed from.

The plaintiff had reason to suppose the defendants would discontinue their trespasses, or, if they were continued, they would resort to legal means to justify them. They had no reason to believe that the defendants deliberately intended to prosecute their enterprise, altogether regardless of the legal rights of others, and were justified in delaying a reasonable time in expectation that the defendants would eventually do justice to those whose property they were appropriating to their own use. The novelty of the questions presented; the vast number of people who were suffering similar injuries; the importance of the projected road for the public convenience, were all

¹ 2 Pomeroy's Eq. Jurisprudence, § 817; Bigelow on Estoppel, pp. 476 *et seq.*

² L. R. (9 Ch. Div.) 176.

³ L. R. (27 Ch. Div.) 523.

⁴ 128 U. S. 523.

⁵ Attorney-General *v. Eastlake*, 11 Hare 205.

⁶ *Fullwood v. Fullwood*, *supra*.

circumstances addressed to the discretion of the court upon the question of laches, and presented strong reasons why a strict rule should not be applied to the delay of the injured parties in seeking redress in this and similar cases.

The rule requiring promptness in soliciting the intervention of a court of equity, is always addressed to the discretion of the court, and varies much according to the situation of the parties, the nature of the relief demanded and the circumstances of the case.¹ What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors and condemning them to suffer remediless wrongs. The fact that the defendants intended to make their structure permanent, or made it so in fact, constitutes no defense to the action.²

For the reasons stated, we think the judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

RYDER v. BENTHAM.

IN CHANCERY, BEFORE LORD HARDWICKE, C., AUGUST 7, 1750.

[*Reported in 1 Vesey, Sr., 543.*]

MOTION for an order to pull down certain blinds so put up as to obstruct plaintiff's houses.

LORD CHANCELLOR said, he never knew an order to pull down anything on motion; it is sometimes, though rarely, done on a decree. The court will indeed sometimes on motion order the going on to be stopped; but the answer coming in last night, he desired it should be moved next day.

When it was argued, that the court might interpose instantly by interlocutory order to prevent that, for which damages will lie at law, but which are not an adequate remedy. The court will order a building which is erecting, not to be further proceeded in, though not directed to be pulled down; as that might do irreparable mischief to one party if on final hearing the right should be with him;

¹ *Calhoun v. Millard*, 121 N. Y. 82; *Fullwood v. Fullwood*, *supra*; *Rayner v. Pearsall*, 3 Johns. Chy. 578; *Atwater v. Fowler*, 1 Edw. Chy. 420.

² *Krehl v. Burrell*, L. R. (7 Ch. Div.) 551; same case on appeal, L. R. (11 Ch. Div.) 146.

and on that ground will not stay the working a mine ; but that is not the present case ; for by order to restrain from going on, it will be included that this shall not stand. On a right to a water-course or salt springs, if one working under ground diverts the stream, and on motion the court is of opinion the plaintiff has a right to prevent the injury during the hearing, it will be ordered to go in the mean time as before ; as his Lordship held in *Lawton v. Lawton*, which came out of Cheshire. It is only to keep things as they are, till a final determination.

Against the motion.

The houses lie in Leadenhall Street ; and the custom of London allows the building higher, and raising new houses on ancient foundations higher, though it does obstruct another light. *Yelv.* 115 ; 1 Bul. 115 ; *Godb.* 183, and *Calthorp*, 41, in which last case the custom was held good, as it might arise on a lawful commencement in cities. There is some contrariety between the maxims *cujus est solum ejus*, etc., and *sic utere tuo ut ne alienum laedas*; so that at least it is a doubtful right : then the court will never interpose by injunction. But it is not doubtful according to this law, that the defendant has a right to build on this ancient foundation.

It being agreed, that this must be tried, Lord Chancellor said, the sooner the better, and to grant an injunction in mean time : and then this scaffold should be removed. Let the parties therefore by consent proceed to a trial at law in case by the plaintiff, for stopping up his lights : and the defendant to pull down the scaffold, or poles and boards already raised, and be enjoined from building or erecting, whereby any of plaintiff's lights may be obstructed, till after trial had.

ROBINSON v. LORD BYRON.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., MAY 7, 1785.

[*Reported in 1 Brown's Chancery Cases* 588.]

MOTION for an injunction to restrain Lord Byron from preventing the water flowing to a mill which the plaintiffs used for a cotton manufacture, or letting a greater quantity of water than usual flow upon the mill.

The motion was before appearance, upon affidavits which stated that, since the 4th of April, Lord Byron, who had large pieces of water in his park, supplied by the stream which flowed to the mill, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill ; and the affidavits

contained strong expressions of Lord Byron's showing that his object, in these proceedings, was to obtain money from the plaintiffs.

LORD CHANCELLOR. The court will not restrain what has been enjoyed for twenty years past; but if what has been so enjoyed is used in a different way, so as to do mischief, the court may interpose.

His Lordship accordingly ordered an injunction to restrain Lord Byron from using dams, weirs, shuttles, floodgates, and other erections, otherwise than he had done before the 4th of April, 1785.

Afterwards his Lordship altered the terms of the order, and added the words, "so as to prevent the water flowing to the mill, in such regular quantities as it had ordinarily done before the 4th of April."

When the answer came in, it was insisted before the Master of the Rolls, sitting for Lord Chancellor, that the affidavits could not be read; but he was of a contrary opinion.

POLLOCK *v.* LESTER.

IN CHANCERY, BEFORE SIR WILLIAM PAGE WOOD, V.C.,
JUNE 23, 30, 1853.

[Reported in 11 Hare 2(6)]

A MOTION for an injunction to restrain the defendant, his servants, workmen, and agents, from burning or causing to be burnt any bricks on a certain piece of vacant ground belonging to him at North End, Fulham, so as to occasion damage or annoyance to the plaintiffs, Pollock, Pain, and A. R. & A. J. Sutherland, or any of them, as owners or occupiers, or owner or occupier of their respective dwelling houses, gardens, and pleasure grounds, or any of them, or injury or damage to the same dwelling houses, gardens, and pleasure grounds, or any of them.

The plaintiff Pollock was the lessee, under a lease for twenty-one years, of a house and pleasure grounds which he had occupied for four years and a half, and on the improvement of which he had expended a considerable sum of money.

The plaintiff Pain was a tenant from year to year of a dwelling house and pleasure grounds adjoining the premises of Pollock, which he had occupied for upwards of seven years.

The plaintiffs, the Sutherlands, were doctors of medicine, and were the owners of a copyhold house, garden, and pleasure grounds abutting on the same premises, and which they had for many years used and occupied as an establishment for the reception of lunatic patients.

The defendant, being the proprietor of about an acre of ground opposite to the plaintiffs' premises, and only separated therefrom by

the high-road, on which acre of ground, until 1852, stood a dwelling house called Grove Cottage, in the middle of that year pulled down such house, cut down the trees, and grubbed up the shrubs; and in May, 1853, caused to be dug up, on the ground thus made vacant, considerable quantities of earth for the purpose of making or burning bricks; and he subsequently caused a great quantity of bricks to be made of the earth so dug up, and he was preparing to burn the bricks, and had begun to form a clamp of bricks in a corner of the same ground, and placed there a considerable quantity of breeze and large ashes, and burnt bricks, to be used in such clamp for the purpose of firing and burning the same; when, after notice given to the defendant to abstain, the bill was filed, and the application for the injunction made.

The bill and affidavits stated that the clamp of bricks so begun to be formed was not more than sixty yards from the respective houses of Pollock and Pain, and not more than seventy-five yards from the grounds of the Drs. Sutherland; that Pollock had been for several months in bad health and was only now convalescent, and that it was absolutely necessary for his health that the air he breathed should be as pure as possible; and that there were twenty-eight patients in the Drs. Sutherlands' establishment, to whose recovery pure air and exercise in the gardens and pleasure grounds attached to the house was essential.

The bill and affidavits alleged that the burning of bricks on the said piece of ground would be a very great annoyance to the plaintiffs and to all the persons inhabiting their houses, and that great injury would accrue to the plaintiffs and to their dwelling houses, trees, shrubs, and plants; that the process of burning the bricks in the manner intended by the defendant, which was the ordinary mode of burning bricks, would give rise to a dense smoke, and acrid vapors, and blacks, and other floating substances, which would mix with and deteriorate the surrounding atmosphere; that Pollock would be compelled to quit his dwelling house; and in all probability many of the lunatic patients would be compelled to quit the Drs. Sutherlands' establishment, the recovery of those who remained would be retarded, and the business and reputation of the establishment would be injuriously affected.

Mr. Rolt and Mr. Jessel, for the plaintiffs, applied *ex parte* for the injunction.

The Vice-Chancellor, after hearing the affidavits, said that the case was left exceedingly bare, and appeared to be founded entirely on conjecture. One case had decided that burning bricks within forty-eight yards of a dwelling house was a nuisance, but the distance in

this case was considerably more; and there was no affidavit stating that any actual damage had been or must necessarily be suffered. The motion might stand over until the next seal, with liberty to file further affidavits.

Affidavits were subsequently filed, to the effect that the plaintiff Pollock and his wife had both suffered in their health from the noxious air which had been emitted from the burning bricks, and that the latter especially had been affected with nausea from that cause; and that they had been obliged to close and keep closed the doors and windows of their house, in order to exclude the corrupted air; and that the plaintiff Pain had also found like pain and inconvenience from the same cause; but there was no evidence of anybody having suffered in the establishment of the Drs. Sutherland.

On behalf of the defendant, affidavits were made by several persons residing in the immediate neighborhood of the clamp of bricks which was in process of burning, and nearer thereto than the residences of the plaintiffs, and the deponents stated that they felt no inconvenience from the operation. It was, moreover, stated by affidavit that the defendant had obviated all danger of injury to health by using only pure earth, which had no noxious or deleterious qualities, and by avoiding altogether the use of chalk, from which sulphur would have been evolved.

June 30.

Mr. Rolt and Mr. Jessel again moved for the injunction.

Mr. Glasse and Mr. Greene for the defendant.

The VICE-CHANCELLOR said: That although there might be some inconvenience in the state of the record where one or more of several plaintiffs, having several rights, failed in establishing the claim asserted by the bill, and others succeeded, yet the court was, by the Act 15 & 16 Vict. c. 86, s. 49, enabled to modify its decree, according to the circumstances of the case, without refusing relief to those who should prove to be entitled to it.

With regard to the question whether the injunction be granted before any trial at law had taken place, it was a question of the amount of comparative inconvenience. Every case of alleged nuisance necessarily raised a mixed question of law and fact. Every trade and occupation, called into existence to supply the wants of civilized life, whether in the construction of dwellings or otherwise, must be lawfully carried on somewhere; and therefore, irrespective of the circumstances by which it was surrounded, it could not be pronounced a nuisance. The plaintiffs, to succeed in a court of law, must prove first *damnum* and then *injuria*. The observation of Lord Eldon as to

the case of the Duke of Grafton *v.* Hilliard, would seem to imply that he thought it doubtful whether brick burning, even carried on near dwellings, was legally a nuisance. That it is a nuisance under some circumstances was established by the decision of the Vice-Chancellor Knight Bruce in the case of Walter *v.* Selfe, and in this case there was positive evidence, on the affidavits, of the injurious effects which the operation complained of had produced on the state of health of two of the plaintiffs and members of their families; and the fact might also be adverted to, that the plaintiffs had been in the complete enjoyment of their houses, without any brick burning in the neighborhood, until these operations had been commenced.

The order was made to restrain the defendant from burning any bricks on the piece of ground on the pleadings mentioned, other than those which were actually burning in clamp, and not to continue such burning beyond a week from this day; the plaintiffs or one of them, undertaking to proceed with their action at the present assizes for the county of Surrey, and to abide such order as the court might make for payment of any damages which should arise to the defendant in consequence of the order.

TURNER *v.* MIRFIELD.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., FEBRUARY 20,
MARCH 2, 1865.

[*Reported in 34 Beavan 390.*]

THE object of this suit was to restrain a nuisance affecting the plaintiffs' property.

The defendant was the owner of a worsted mill near the plaintiffs' property. The nuisance complained of was of the following nature: In the process of cleaning worsted before manufacturing it, it is washed with soap and caustic alkali, and the liquid used in such washing is afterwards curdled by mixing oil of vitriol with it. By these means, the greasy portion is caused to rise to the surface and is taken off, and the remainder of the liquid is refuse, and contains offensive substances, which emit a very strong and unwholesome stench, injurious to animals and men.

The defendant, in February, 1864, commenced draining this liquid into an old coal-pit on his lands, about forty yards from the plaintiffs' land, and it found its way under ground into the plaintiffs' colliery, and caused sickness to the men and boys there, and seriously injured

their health. It was first observed about the 15th of February, and a correspondence took place between the parties, which commenced on the 2d of May, and ultimately this suit was instituted, on the 25th of June, 1864, praying an injunction to restrain the defendant "from transmitting or allowing to flow from his mill into the plaintiffs' land, or the mines in or under such land, the refuse fluid from his mill or any part of it, or any other water or fluid containing any filthy, noxious or offensive substance or materials."

The existence of the nuisance was, in the opinion of the court, established.

Mr. Hobhouse and *Mr. Wickens* for the plaintiffs.

Mr. Baggallay and *Mr. Rigby* for the defendant.

Mr. Hobhouse in reply.

*Eaden v. Forth*¹ and *Swaine v. The Great Northern Railway Company*,² were cited.

March 2.

THE MASTER OF THE ROLLS. In defence, it is said, on behalf of the defendant, that the utmost that the court can now do is, to direct an issue, and that the court must either direct an issue to try whether there is a nuisance, or it must hear additional evidence, and determine the question of fact. I dissent from that argument, for I am of opinion that it is not necessary to adopt that course, except when there is some doubt on the mind of the court as to the fact; but here I am satisfied that there is a nuisance, and that the plaintiffs are entitled to have it stopped.

It is alleged that the plaintiffs are not entitled to any injunction, because the bill was not filed until six months after the nuisance was perceived. This delay would be very material, in the case of an interlocutory application for an injunction, but it cannot have any bearing at the hearing of the cause. The plaintiffs are not applying for an interlocutory injunction, and they are entitled, at the hearing, to have their property protected for the future.

It is also objected, that there is some evidence to show that the suit is got up by Colonel Tempest (a neighboring proprietor who had been affected by the nuisance), who, it is said, has indemnified one of the plaintiffs, and there is some proof of actual co-operation of Colonel Tempest. I am of opinion, that although that were established, it cannot bar the plaintiff from his right to have the nuisance discontinued.

The plaintiffs are entitled to a perpetual injunction in the terms of the prayer of their bill.

¹ 1 Hem. & M. 573.

² 33 L. J. (Ch.) 399.

DURELL v. PRITCHARD.

IN CHANCERY, BEFORE SIR G. J. TURNER AND SIR J. L. KNIGHT
BRUCE, LORD JUSTICES, NOVEMBER 23, 24, 25,
DECEMBER 5, 22, 1865.

[*Reported in Law Reports, 1 Chancery Appeals, 244.*]

THE plaintiffs in this case were the owners, as devisees in trust under the will of John Stables, of two houses, Nos. 32 and 33, on the west side of Rathbone Place, Oxford Street. The back premises of these houses, which were used as workshops, looked upon a Mews called Glanville Mews, running from north to south between Rathbone Place and Newman Street. The plaintiffs were also the owners of the premises at the southern extremity of the Mews.

The buildings forming the west side of Gianville Mews, opposite to the backs of Nos. 32 and 33 Rathbone Place, and also the ground and soil of the Mews itself, subject to a right of way for the plaintiffs through the Mews, belonged to the defendant, Henry Pritchard, and the buildings were used by him as livery stables.

The whole of these premises formerly belonged to Deborah Robson and John Stables, as tenants in common in fee, but by a deed of partition dated the 24th February, 1853, the part now the property of the plaintiffs, was conveyed in severalty to John Stables; and the part now the property of the defendant, was conveyed to Deborah Dobson, subject to a right of way for John Stables, his heirs and assigns, with and without horses, carts, and carriages, through and along the Mews.

At the date of the partition deed, and for some years before, the surface of the Mews, which was about twenty feet in width, was partially covered by a lean-to or shed projecting from the stables about half-way across the Mews, opposite to the back of the houses in Rathbone Place, and supported by wooden posts. The roof of this shed sloped downwards from the stables, and was of the height of about 18 feet at the back nearest the stables, and about 13 feet 6 inches at the front, or lowest part. The shed did not extend along the whole length of the Mews, but between its southern end and the southern extremity of the Mews was an open space, part of which was occupied by a dung-pit, about ten feet square.

In July, 1863, the defendant commenced building on the premises belonging to him, and on the site of the shed, and on the ground a foot or two in advance of it, he erected a new brick building of greater height and length than the old shed. The height of the front of the new building, facing the back of plaintiffs' houses, was about 20 feet,

and the height of the middle of the roof about 25 feet, and it extended southwards so as to cover over the space formerly left open. The new building was begun on the 18th July, 1863, but no complaint was made of it until the 5th September, when Mr. Loaden, the solicitor of the plaintiffs, wrote to the defendant, complaining of the new building as obstructing the light coming to the rear of the houses, Nos. 32 and 33 Rathbone Place, and requesting that the building might be stopped. At that time the walls had been carried to their full height, but the building was not completed.

Some further applications to the same effect were afterwards made by Mr. Loaden, but nothing was done upon them; and on the 11th October, 1863, Mr. Loaden died.

On the 30th October, Messrs. Parker, the plaintiffs' solicitors, who had succeeded Mr. Loaden, called on the defendant's solicitor and renewed the complaints on the subject of the building, and a further correspondence took place, which continued till the end of November, but without inducing the defendant to desist from his building, which was completed before the 26th of that month. The plaintiffs accordingly filed their bill on the 8th January, 1864.

The complaint of the plaintiffs was not confined to the loss by the tenants of light and air, but they also alleged that the plaintiffs' right of way along the Mews had been injured by the new building, which prevented carts and wagons from turning round in the Mews; and that it had been further obstructed by the defendant having allowed vans and carriages to stand in the Mews. The bill (as amended) prayed that the defendant might be restrained from permitting the new building to continue or remain in its present state, and that he might be ordered to pull down and remove or alter the same, and to restore the Mews and buildings to the state they were in prior to the erection of the new building. It also prayed that the defendant might be restrained from erecting any building in such a manner as to obstruct or interfere with the right of way of the plaintiffs, or the free access and circulation of light and air to any of the plaintiffs' houses; and that the defendant might be restrained from blocking up or obstructing the right of way by keeping or placing in the Mews any flies, horses, or carriages, or by any other means. The bill also prayed that damages might be awarded to the plaintiffs for the injury and expense they had sustained.

The defendant by his answer admitted the main facts stated in the bill, but he denied that he had caused any material obstruction either to the free access of air and light or to the plaintiffs' right of way. Both parties entered into evidence, the effect of which is stated in the judgment of Lord Justice Turner.

The Master of the Rolls, before whom the cause was heard, was of opinion that, admitting that the plaintiffs had proved that they had received material injury from the defendant's building, they were not entitled to an injunction, by reason of the works having been entirely completed before the bill was filed: and that, as they were entitled to no substantial relief in equity, their claim for damages failed also.¹

From this decree the plaintiffs appealed.

Mr. Baggallay, Q.C., and Mr. Hardy, for the plaintiffs.

Mr. Selwyn, Q.C., and Mr. T. Stevens, for the defendant.

December 22.

SIR G. J. TURNER, L.J., after stating the facts of the case, and referring to the pleadings in the cause, continued:

There is evidence in the cause, both on the part of the plaintiffs and of the defendant. The witnesses on the part of the plaintiffs speak generally to obstruction arising from the defendant placing vans and carriages in the Mews, or allowing them to stand there, and to inconvenience arising from wagons and carts being unable to turn in the Mews in consequence of the defendant's buildings; but it is evident from the testimony of these witnesses that there has always been difficulty in turning carts and carriages in the Mews. Some of the plaintiffs' witnesses also speak to the diminution of light and air coming to the back of the plaintiffs' houses; but most of the witnesses speak of this in general terms, that the light and air is considerably, or materially, or seriously, diminished. It is said, however, in the affidavit of one or two of them, that in the winter months there is a loss of an hour's daylight in the afternoon. On the other hand, R. Wheeler, one of the witnesses on the part of the defendant, states: "I say that there is not now more difficulty or inconvenience of turning round carts and carriages in the said Mews than there was before the erection by the defendant of the said new buildings." And again, "During the progress of the said new buildings, or at any time since, I never heard of any complaint on the part of any of the tenants or occupiers of the houses at the back of Rathbone Place, that the erection of the said new buildings would obstruct the light or air at any of the back windows of these houses, or any other complaint of the said new buildings; but on the contrary, some of the tenants of the houses in Rathbone Place, abutting on the Mews, have expressed themselves as pleased with the alterations of the defendant's premises, observing that the new erection looked much nicer than the old shed, or to that effect." And another of them, Louis Boura, who is the

¹ The case is reported 13 W. R. 981.

occupier of No. 31, says: "The wall of the said Henry Pritchard's new buildings was raised at the time of the alteration about five or six feet. There is not any material or perceptible diminution of light or air to my back premises arising from the aforesaid alteration."

The Master of the Rolls, upon the hearing of the cause, dismissed the bill with costs, upon the grounds, as appearing in the report, that as to ancient lights—and from another part of the report it is to be collected that his Honor meant as to other easements also—the court could not entertain the matter, as the damage had been actually completed before the bill was filed; in support of which view his Honor referred to the case of *Deere v. Guest*. The plaintiffs have appealed from this decree. Three points have been insisted on upon their behalf in support of this appeal. First, that notwithstanding the damage was completed before the bill was filed, it was competent to this court to grant the relief by way of injunction prayed for by the bill; secondly, that under the circumstances of the case, that relief ought to have been granted; and, thirdly, that assuming that the relief by way of injunction was properly refused, damages ought to have been awarded to the plaintiffs.¹

As to the first of these points, the course of the court in granting mandatory injunctions, such as are prayed for by this bill, was gone into much at large on the part of the plaintiffs, and a great number of cases upon the subject were cited. I have looked into these cases with as much attention as I have been able, and I do not find that any distinction has been taken in them as to the granting of such injunctions in cases of easements, and in other cases, and certainly they do not seem to me to warrant any such general rule as the Master of the Rolls has laid down being adopted in all cases. The case of *Deere v. Guest*, on which his Honor seems mainly to have relied in support of the rule laid down by him, does not seem to me to support it. It certainly does not in terms lay down any such general rule as his Honor has pronounced, and it does not seem to me to prove anything more than that the facts alleged in that particular case were not considered by the court to be such as to warrant the granting of the mandatory injunction which was asked by the bill. It would certainly not be consistent with the authorities to lay down any such general rule as applicable to all cases; and I can see no principle which can warrant its being laid down as applicable to cases of easements and not to other cases, for in many cases the damage occasioned by interfering with an easement is as great, if not greater, than would be occasioned by interfering with other rights.

I cannot, therefore, venture to go so far as the Master of the Rolls

¹ So much of the opinion as relates to the third point has been omitted.—ED.

appears to have gone in this case, or to say that relief by way of injunction ought to have been refused in this case upon the mere ground that the damage had been completed before the bill was filed. The authorities upon this subject lead, I think, to these conclusions—that every case of this nature must depend upon its own circumstances, and that this court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld.

Such, then, being the principles by which we ought to be guided in determining this case, I proceed to consider the second question, whether, under the circumstances of this case, the relief by way of injunction prayed by this bill ought to have been granted, and I am of opinion that it ought not. There are three matters in respect of which the relief is asked. The obstruction to the right of way occasioned by the extension of the new buildings beyond the limits of the shed; the obstruction to the right of way by carriages being allowed to stand in the roadway; and the impediment to the access of light and air occasioned by the new buildings. As to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, the case is one merely of temporary and occasional inconvenience; and as to the third ground, I think that the diminution of light and air to the plaintiffs' houses is not such as would warrant us in granting the relief which is asked. I fully agree in the observations of the Lord Chancellor in the late case of Clarke *v.* Clark,¹ which seem to me to go far towards disposing of this part of the case.

SIR J. L. KNIGHT BRUCE, L.J.: I assent to each of my learned brother's conclusions, and for the reasons which he has stated.

¹ [Law Rep., 1 Chan. App. 16.]

THE LONGWOOD VALLEY RAILROAD COMPANY v.
BAKER AND OTHERS.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1876.

[Reported in 27 *New Jersey Equity Reports* 166.]

ON motion (on order to show cause) for attachment for contempt for violation of injunction, and counter motion to dissolve the injunction.

Mr. H. C. Pitney for complainants.

Mr. C. Parker and *Mr. E. D. Halsey* for the defendants Henry and William Baker.

The CHANCELLOR. The complainants are a corporation under a special act of the Legislature of this State. Their contemplated railroad, as located, will cross that of the Morris and Essex Railroad Company, now, and for some years past, in possession of the Delaware, Lackawanna and Western Railroad Company, as lessees thereof, at the place where the last-mentioned railroad crosses the Rockaway river, near Baker's mills, which are now owned by the defendants Henry and William Baker. That railroad crosses the river there on a viaduct, and the companies just mentioned, owners and lessees thereof, have given license to the complainants to lay their tracks across the river under the viaduct, the complainants agreeing to build a new superstructure for the viaduct, to enable them to pass under it with their locomotive engines, which, with the present superstructure, would not be practicable. The land on which the complainants had leave to lay their track in crossing the river, was taken, by condemnation, by the Morris and Essex Railroad Company, in or about 1853, under their charter, from the father of William and Henry Baker, who was then the owner thereof. The charter¹ provides that, on condemnation, the company shall, upon payment of the value of the land and damages, with costs, if any, be deemed to be seized and possessed of the land in fee simple. The complainants having located their road over adjoining land of William and Henry Baker, proceeded to the condemnation thereof. They included in their application the land covered by the river at the crossing. William and Henry Baker are the owners of a grist-mill below the crossing, and having, on the 4th of March last, received notice of the application for the appointment of commissioners in the proceedings for condemnation, they raised the dam of their pond there about fifteen

¹ Pamph. Laws of 1835, p. 28.

inches. The complainants subsequently, on the 23d of the same month, proceeded, under their license, to lay down their track across the river. Henry Baker then came to the ground and forbade the complainants' workmen to lay the track, and threatened to tear it up. His commands and threats being disregarded, he shut the gates of the dam of his grist-mill pond and opened the gates of a forge-pond, belonging to him and his brother William, above that place, and let down a great quantity of water into the river where the track was being laid, and so raised the water there about two feet, and entirely flooded the track, thus making it impracticable for the complainants' workmen further to proceed with the laying thereof. The bill was then filed and an injunction granted upon it, restraining the Messrs. Baker from interfering with the track under the viaduct, and from damming or penning back the waters of the river at and above their grist-mill pond, in such manner as to cause the water to rise any higher, at and under the viaduct, than it was accustomed to rise at and previous to the 4th of March, 1876, the date of the service on them of the notice of the application for the appointment of commissioners in the proceedings for condemnation. They appear, from the affidavits which were used on the motion for an attachment against them for contempt for violation of the injunction, not to have reduced the height of the water in their grist-mill pond to the height at which it was on the day mentioned in the injunction, and which, from the evidence, was the height at which it had been accustomed to be for seven years before that time. It appears from the affidavits on the part of the complainants, that the height at which the water was accustomed to be at the viaduct, during those seven years, was not above the plinth of the pier of that structure. On the 10th of April last, several days after the injunction was served, the water stood nineteen inches above the plinth. There was nothing unusual to cause this except the height of the water in the grist-mill pond, occasioned by the height of the dam. That the water in that pond might have been reduced to the level of the top of the plinth, there is no room to doubt. The top of the tumbling dam was lower than the top of the plinth from October, 1875, at least, until the month of March, in this year, when the addition complained of was made. Nor would it have occasioned damage to the mill-owners to have kept the water down to the height of the top of the plinth. They had made no addition to their machinery, in view of the increased power they had provided by raising the dam; nor was there any alteration of the machinery in view of it. The fact seems to be that they are not disposed to yield the point that the top of the plinth is high water mark, but insist that it is rather the mark of average low water. I do not

deem it important to discuss the testimony on that point here, although I have given it a very careful consideration. It is enough to say that the case leads to the conclusion that the raising of the dam and letting down the water were both done at the particular time when they were done, to embarrass the complainants in constructing their road under the viaduct. While the witnesses on the part of the complainants testify to observation for years past, as to the height of the water—observation all the more to be relied on because it was in connection with the feasibility of safely laying the track under the viaduct—it appears, by evidence adduced by the Messrs. Baker, that in October, 1875, and from thence until the raising of the dam in March following, the height of the dam was less than that of the top of the plinth, and though it is said that at the former date the dam was lowered, it appears to have been lowered not more than four inches. It is said, it should be remarked, that the intention to raise it higher in the spring was then declared.

On the evidence laid before me in the affidavits, I am not satisfied that the accustomed height of the water was not as sworn to by the complainants' witnesses. Under the circumstances I deem it my duty to preserve the *status quo* until the hearing, and, to that end, will modify the injunction so as to restrain the Messrs. Baker from keeping the water at a height greater than the top of the plinth. All intention of violating the mandate of the court is disclaimed, and the complainants desire that this motion for an attachment should result in the authoritative and explicit declaration of the court as to the duty of the Messrs. Baker, rather than in punishment for contempt. The order to show cause will be discharged, without costs.

As to the motion to dissolve the injunction.¹

The Messrs. Baker object also, that the injunction is mandatory, and that inasmuch as the addition had been made to the dam when the bill was filed, such an injunction is contrary to the established practice of the court. The objection cannot be sustained. The injunction is against causing the water to rise any higher than it was accustomed to rise on the day designated. The injury was a continuing injury from day to day. The mill-owners were not required to reduce their dam, but to refrain from raising the water beyond a certain height. Besides, if the injunction were regarded as strictly mandatory, that would not constitute a valid objection to it. There is no general rule against granting such relief interlocutorily, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and

¹ A portion of the opinion relating to this question has been omitted.—ED.

injury to other rights. The court will not, however, interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief; and each case must depend on its own circumstances.¹

KREHL v. BURRELL.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, DECEMBER
4, 6, 1877; JANUARY 28, 1878.

[*Reported in Law Reports, 7 Chancery Division, 551.*]

THIS was an action brought by the plaintiff, as owner and occupier of a messuage or a public-house, No. 27 Coleman Street, in the City of London, known as the "Three Tuns," with a restaurant and dining-room, to obtain an injunction to restrain the defendant from erecting a building on the site of an adjoining court, called Windmill Court, over which the plaintiff and his predecessors in title claimed an uninterrupted right of way to or from the said messuage for forty years.

The defendant had, shortly before the commencement of the action, purchased the houses around Windmill Court, and served upon the plaintiff a notice of his intention to build, and had begun obstructing the access to the plaintiff's premises, whereupon the plaintiff informed the defendant of his alleged rights, and on the 27th of April, 1876, issued his writ. The defendant, however, continued his building, which was a large and expensive structure, thus blocking up the access to the back of the plaintiff's house, which was, as the plaintiff alleged, essential for the purposes of his business, though there was a front entrance in Coleman Street.

In December, 1877, the trial of the action came on, and witnesses were examined. The court was of opinion that the plaintiff had established his right and gave a verdict accordingly, but directed the case to stand over to see what terms the defendant would propose.

1878, Jan. 28. The case now came on for judgment. It appeared that the defendant offered a substituted right of way which the plaintiff was willing to accept, provided that the defendant paid him £700 for damages for the difference between the two rights of way, and £100 for being deprived of access to his house by Windmill Court during the defendant's building, and the costs of the action.

The defendant refused to accede to these terms.

¹ *Durell v. Pritchard*, L. R. 1 Ch. 244, 250; *North of England Junc. R. Co. v. Clarence R. Co.*, 1 Coll. 507; *Westminster Brymbo Coal and Coke Co. v. Clayton*, 36 L. J. Ch. 476; *Kerr on Injunctions*, 230, 231.

*Davey, Q.C., and Everitt, for the plaintiff
Chitty, Q.C., Hemings, and Clare, for the defendant.*

JESSEL, M.R., then gave judgment on the verdict, and ordered that the defendant should be restrained from erecting upon or across the site of Windmill Court, or any part thereof, any building or erection so as to interfere with or obstruct the plaintiff's right of way or passage over or along the said court as the same existed before the commencement of the action. His Lordship added a mandatory order that the defendant, within three months from the date of the judgment, take down and remove any building or erection which he had, since the commencement of the action, erected or built on or across the site of Windmill Court, or any part thereof, so as to obstruct or interfere with the said right of way. His Lordship then continued as follows :

Before parting with the case I should like to say a few words about my view of the proper mode of exercising the discretion of the court in reference to the jurisdiction conferred on the court by the Act 21 & 22 Vict. c. 27, commonly called Lord Cairns' Act. The words of the 2d section are general: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

The plaintiff in this action was the owner of an inn or public-house, No. 37 Coleman Street, in the City of London, with which he and his predecessors in title had, and enjoyed for many years without interruption, a user of a way or passage, and he claimed to be entitled as of right to such user. The user was undoubted, and the right was never disputed until the purchase by the defendant recently of the adjoining houses. The defendant threatened to obstruct the way, and the user of the passage or court, by erecting a large building. The plaintiff gave notice to the defendant that he was entitled to such way as of right, and on the defendant persisting in his threats the plaintiff brought an action, and issued a writ for an injunction on the 27th of April, 1876. Notwithstanding that the writ was issued, and in spite of the assertion by the plaintiff of his rights, the defendant, with full notice, and without any reasonable ground that I could discover at the trial of the action, and indeed without any ground at all, for none has been brought before me, insisted upon obstructing the

way, and built over it a solid, and I am told a large and expensive structure, which completely blocked it up.

The action having been commenced in April, 1876, was brought to trial in December, 1877, and upon the trial by oral evidence I thought the right of the plaintiff clearly established, and gave a verdict accordingly. But, considering the position of the parties, I thought it desirable to give the defendant an opportunity of coming to terms before I delivered judgment. I thought it more likely he would make good terms before judgment than he would afterwards; and in mercy to the defendant, so as not to put him entirely in the power of the plaintiff, I allowed the case to stand over. It seems that some terms have been proposed offering a substituted right of way, which the plaintiff is willing to accept, provided the sum of £800 is paid to him as damages. Whether or not that is a reasonable sum I have no means of ascertaining without a further trial, which of course I do not intend to have, these being terms of compromise and nothing else. At all events the sum in question does not appear to me to come at all within the description of extortion, especially considering the enormous benefit which would accrue to the defendant by allowing this expensive building to remain. So far I think my object has been accomplished. But, however, the defendant declines to pay the damages, and prefers, if necessary, to submit to an injunction, which of course he is entitled to do, for he is entitled to decide that for himself.

The question I have to decide is, whether the appeal to me by the defendant to deprive the plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is true he has another way to his house by Coleman Street; but it was obvious, when the facts were mentioned to me, that as regards the custom of the house it would be very seriously interfered with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the court, "You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,"—of course that simply means that the court in every case, at the instance of the rich man, is to compel the poor man

to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the Lands Clauses Act, to compel people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavored to deprive his neighbor, the man with small possessions, of his property, with or without adequate compensation.¹

SMITH v. DAY.

IN THE COURT OF APPEAL, FEBRUARY 18, 1880.

[Reported in *Law Reports*, 13 Chancery Division, 651.]

IN this case an interlocutory injunction had been granted by Vice-Chancellor Hall to restrain the defendant from continuing the erection of certain buildings which, as the plaintiffs alleged, would darken ancient lights on their property. The defendant moved to discharge this order, offering by his notice of appeal to give, if necessary, an undertaking to abide by any order the court might make at the hearing as to pulling down or altering any buildings or works erected by him. Some additional evidence was filed by the defendant and read on the hearing of the appeal.

W. Pearson, Q.C., and Maidlow, for the appellant.

Hastings, Q.C., and Vernon R. Smith, for the plaintiffs.

The court held that, taking the fresh evidence into account, the plaintiffs had not established their right to an interlocutory injunction. After the reasons for that conclusion had been stated—

JESSEL, M.R. The injunction will be discharged, the defendant giving an undertaking in the terms offered by his notice of appeal. At the same time, I wish to express my decided opinion that, without any undertaking, the court has jurisdiction to order the pulling down anything erected after the commencement of the action, or after notice given to the defendant that his erecting it is objected to.

¹ Decision affirmed on appeal, *Krehl v. Burrell*, L. R. 11 Ch. Div. 143.—ED.

JAMES, L.J. I am of the same opinion, and consider that an undertaking is not necessary ; but I prefer taking it, because it remains as evidence of a contract entered into by the defendant with the court.

COTTON, L.J. I also am of opinion that whatever a defendant erects after the commencement of the action, or after notice that an action will be brought, is subject to the control of the court.

JAMES C. TUCKER AND ANOTHER *v.* OWEN HOWARD.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 3,
FEBRUARY 27, 1880.

[*Reported in 128 Massachusetts Reports 361.*]

BILL IN EQUITY for an injunction against obstructing a passageway running from Merrimack Street in Boston, by erecting the wall of a building within it. A preliminary injunction was refused ; and the defendant completed the wall. Upon a hearing on the merits, it appeared that the plaintiffs owned the land on one side of the passageway, and the defendant owned the land on the other side of the passageway and in the rear of it ; that the plaintiffs had by deed "the right to pass and repass in, upon and over" the passageway in question, which was described as "five feet wide and ten feet high"; and that the defendant had the right to build over the passageway, leaving it "five feet wide in the clear, and not less than ten feet high"; and it was decided that the plaintiffs had the right to a way of the dimensions stated, and not merely to a convenient right of way ; and that the wall erected within the passageway was in violation of the plaintiffs' right.¹

The case was referred to a master to ascertain the manner in which the building could be altered so as to make the passageway as wide as before, and the cost of such alteration, as well as the damages to the plaintiffs' estate if the wall should be allowed to remain in the passageway, and any damage suffered by the plaintiffs pending the suit. The master reported that the wall could be altered at a cost of \$530, by taking down part of it, and substituting two iron columns with an iron beam thereon to support the wall above, so as to leave the passageway five feet wide, except that one of these columns would project a few inches into the passageway ; that, assuming that the plaintiffs had the right to only so much light and air over the defendant's land as was necessarily incidental to the passageway, if five feet wide and ten feet high, and built over for its whole length, the permanent pecuniary damage to the plaintiffs' estate, if the present wall was allowed to remain, was \$200 ; that if the plaintiffs had any greater right of light and air, this

¹ 122 Mass. 529.

damage would be enhanced ; and that the damage caused pending the suit and while the work of building was in progress, by excavations and driving piles and thereby causing the foundations of their house to settle, disturbing and interrupting the occupation thereof, and breaking in their drain, was \$462.

At the hearing on the master's report, Endicott, J., entered a final decree, commanding the defendant to alter his building as above stated, and to pay to the plaintiffs the sum of \$462, as reported by the master, and costs. The defendant appealed to the full court.

A. A. Ranney for the plaintiffs.

C. A. Welch for the defendant.

GRAY, C. J. The defendant, since the filing of this bill, has built a wall in the plaintiffs' passageway, which has been decided to be a violation of their right.¹ The plaintiffs' right in the passageway included the right to so much light and air as was necessarily incident to the use of the passageway.² The master finds that the permanent damage to the plaintiffs' estate, if the defendant's building is allowed to remain as it is, is \$200, and that the building can be altered in the manner directed by the decree appealed from, at an expense of \$530. The fact that no temporary injunction has been granted does not affect the kind or the extent of the remedy to which the plaintiffs are entitled upon establishing their right at the hearing on the merits. The defendant having, by the service of process, full notice of the plaintiffs' claim, went on to build at his own risk ; and the injury caused to the plaintiffs' estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrong doer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition.³ The decree for a mandatory injunction, and for payment of damages suffered pending the suit, and for costs to the plaintiffs as the prevailing party, must therefore be affirmed, with costs.

¹ *Tucker v. Howard*, 122 Mass. 529.

² *Atkins v. Bordman*, 2 Met. 457.

³ *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238, 246, 255 ; *Aynsley v. Glover*, L. R. 18 Eq. 544, and L. R. 10 Ch. 283 ; *Krehl v. Burrell*, 7 Ch. D. 551, and 11 Ch. D. 146 ; *Schwoerer v. Boylston Market Association*, 99 Mass. 285 ; *Creely v. Bay State Brick Co.*, 103 Mass. 514 ; *Nash v. New England Ins. Co.*, 127 Mass. 91 ; *Salisbury v. Andrews* [128 Mass.] 336.

HIRAM HART, APPELLANT, *v.* WILLIAM T. LEONARD,
RESPONDENT.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, NOVEMBER
TERM, 1886.

[*Reported in 42 New Jersey Equity Reports 416.*]

ON appeal from a decree advised by VICE CHANCELLOR BIRD, who filed the following conclusions :

This bill is filed to obtain an injunction against the defendant, restraining him from obstructing an alleged private way over his lands. The complainant claims that he and his grantors have used the said way for over twenty years adversely to the defendant and those under whom he claims. More than twenty years ago, one of the grantors of the complainant purchased a small tract of woodland, and, from time to time, went to it and from it over the lands of the defendant by the way in question. Over this way he carted such timber as he saw fit to his farm and dwelling, which were wholly disconnected with the wood-lot. The practice of carting wood and timber, when desired, by those who have owned the same farm and dwelling, has continued without interruption or resistance in any way until the obstruction complained of in the bill. The proof is undoubted that the complainant and his grantors used the way in question in going to and from said wood-lot for more than twenty years. The counsel for the defendant frankly and fairly, too, admitted this, but insisted that while there had been such user, it was not adverse in a legal sense. This brings us to the real defence in the case.

First. It is claimed that the said way was used by the complainant and his grantors under a license. The proof of this license rests upon the testimony of the defendant only. The person to whom he says he gave the license, then the owner of the farm, dwelling, and wood-lot, is dead. The defendant says this license was given about thirty years ago ; that the then owner would visit his wood-lot once or twice a year, and in doing so would drive with his horse and wagon to the barn of defendant, located hard by the said way, where he would tie his horse and walk thence to his wood-lot ; and that upon one of those occasions he said that he would not want to use the said way much, but only once in a while. If this amounts to a license, the defendant is justified in his defence.¹ But I can see nothing in the statements of the defendant that amounts to a license. Nothing appears that shows a formal asking or permission. It is only the ordinary conversation which might take place between neighbors at any time under similar circumstances, without the assertion, denial, or granting of any rights or privileges. I must therefore conclude that this branch of the defence fails.

¹ *Wood v. Hurd*, 5 Vr. 87.

Second. It is insisted that whatever right may have been acquired by adverse user has been lost by the complainant, and those under whom he claims, consenting or submitting to a change in the location of the way at a given point. This change was made immediately opposite the barn of defendant. The defendant built a new barn and wanted to improve the approaches to it, to do which it was necessary to change the location of said way ; he therefore made a change of about fourteen feet. There was a gate there across the way as it originally lay. The defendant made and swung a new gate across the way when changed.

Now, it is said that the complainant and his grantors, having consented to this change, and not having used the way as changed for twenty years, the claim by adverse user fails. I am not prepared to go the length required to sustain this view, under the circumstances of this case. The change indeed was slight ; it was made solely for the accommodation of the defendant himself and by the defendant himself. I cannot understand upon what principle he can claim to take advantage of such an act. But there is one fact developed in the case which very conclusively answers both points presented by the defence.

Not long previous to the institution of this suit, the defendant was sworn as a witness in another cause, when, in speaking of this right of way, he said that it was used by everybody who wanted to go through in that direction beyond the lot of the complainant, or to a public road still farther away. He made this broad declaration, saying that everybody used it who desired to, without any qualification. This would seem to conclude the controversy.

I can find nothing to warrant me in supposing that the defendant was not, at that time, fully apprised of all the facts and circumstances connected with the use of the said way, and the rights and demands of others as against himself. In my judgment, he cannot be heard in speaking to the contrary thereof now ; he is bound by the declarations then most solemnly made.

I will advise that the injunction be made perpetual. The complainant is entitled to costs.

Mr. O. P. Chamberlain for appellant.

Mr. R. S. Kuhl for respondent.

The opinion of the court was delivered by

DIXON, J. The bill in this case avers that the complainant is the owner of a wood and pasture lot containing three and thirty-seven hundredths acres of land, and that he and his predecessors in title have, by adverse user for over twenty years, acquired a right of way across the lands of the defendant from a certain public road to said lot ; that the defendant now obstructs said way ; and the bill therefore prays a decree that the complainant is entitled to the way, and a mandatory injunction,

commanding the defendant to remove the obstruction, and allow the complainant to pass through at his pleasure.

The answer denies the complainant's right.

The complainant's testimony tends to show user for over twenty years. The defendant's testimony tends to show that the user was not adverse, but was by his express permission, as an act of neighborly accommodation.

The Vice-Chancellor advised a decree and injunction, according to the prayer of the bill. Hence this appeal.

From the foregoing statement it appears that the claim set up is to a purely legal interest in lands, resting upon a purely legal basis. Before attempting to determine the validity of the claim, it is proper to consider whether the question presented comes within the cognizance of a court of equity.

No doubt many cases arise in which courts of equity may, by decree and injunction, protect and enforce legal rights in real estate. So far as they are exemplified in our chancery practice, these cases can, I think, be classified under the following heads :

1. Cases where the legal right has been established in a suit at law, and the bill in equity is filed to ascertain the extent of the right and enforce or protect it in a manner not attainable by legal procedure.¹
2. Cases where the legal right is admitted, and the object of the bill is the same as in the class just mentioned.²
3. Cases where the legal right, though formally disputed, is yet clear, on facts which are not denied and legal rules which are well settled, and the object of the bill is as before stated.³
4. Cases where one attempts to appropriate the land of another, under color of statutory authority, without complying with the legal conditions precedent.⁴
5. Cases where the object of the bill is to stay waste.⁵
6. Cases where the object of the bill is to prevent an injury which will

¹ *Quackenbush v. Van Riper*, 2 Gr. Ch. 350.

² *Carlisle v. Cooper*, 6 C. E. Gr. 576; *Shivers v. Shivers*, 5 Stew. Eq. 578; s. c., 8 Stew. Eq. 562; *Johnston v. Hyde*, 6 Stew. Eq. 632.

³ *Shreve v. Voorhees*, 2 Gr. Ch. 25; *Hulme v. Shreve*, 3 Gr. Ch. 116; *Morris C. & B. Co. v. Soc. Est. U. M.*, 1 Hal. Ch. 203; *Earl v. De Hart*, 1 Beas. 280; *Dodd v. Flavell*, 2 C. E. Gr. 255; *Johnson v. Jaqui*, 10 C. E. Gr. 410; s. c., 12 C. E. Gr. 526; *Demarest v. Hardham*, 7 Stew. Eq. 469; *Higgins v. Flemington Water Co.*, 9 Stew. Eq. 538.

⁴ *Ross v. Eliz. & Som R.R. Co.*, 1 Gr. Ch. 422; *Browning v. C. & W. R.R. Co.*, 3 Gr. Ch. 47; *Higbee v. C. & A. R.R. Co.*, 4 C. E. Gr. 276; *Folley v. Passaic*, 11 C. E. Gr. 216; *Morris C. & B. Co. v. Jersey City*, 11 C. E. Gr. 294.

⁵ *Capner v. Flem. Min. Co.*, 2 Gr. Ch. 467; *Bank of Chenango v. Cox*, 11 C. E. Gr. 452.

be destructive of the inheritance, or which equity deems irreparable, *i.e.*, one for which the damages that may be recovered according to legal rules do not afford adequate compensation.¹

7. Cases where the object of the bill is to protect one's dwelling from injuries which render its occupancy insecure or uncomfortable.²

8. Cases where the right to be protected or enforced grows out of the expressed or implied terms of a contract, so that the court can entertain jurisdiction by virtue of its power to compel specific performance.³

9. Cases where the object of the bill is to prevent a multiplicity of suits, otherwise rendered necessary by the fact that many persons are interested in the controversy.⁴

Outside of these classes, there is no jurisdiction in a court of equity over the invasion of mere private legal rights in land. The appropriate remedy is by suit at law.

The case in hand does not come within any of these classes. It bears no trace of resemblance to any except those of the third or those of the sixth class. But the third class does not include it, because the evidence shows a substantial dispute over the fact of adverse user, which the defendant is entitled to have settled by the verdict of a jury; and the sixth class does not cover it, because the temporary obstruction of a way to a small wood and pasture lot can be fully paid for by the damages recoverable according to legal rules.

The decree below should be reversed, and the bill should be dismissed. Decree unanimously reversed.

¹ Morris C. & B. Co. *v.* Jersey City, 3 Stock. 13; Franklinite Co. *v.* Zinc Co., 2 Beas. 215; Zinc Co. *v.* Franklinite Co., 2 Beas. 322; Zinc Co. *v.* Franklinite Co., 2 McCart. 418; Southmayd *v.* McLaughlin, 9 C. E. Gr. 181; Manko *v.* Chambersburgh, 10 C. E. Gr. 168; Johnston *v.* Hyde, 10 C. E. Gr. 454; Thomas Iron Co. *v.* Allentown Mining Co., 1 Stew. Eq. 77; Fulton *v.* Greacen, 9 Stew. Eq. 216; Lord *v.* Carbon Iron M. Co., 11 Stew. Eq. 452.

² Brakely *v.* Sharp, 2 Stock. 206; Holsman *v.* Boiling Spring Co., 1 McCart. 335; Ross *v.* Butler, 4 C. E. Gr. 294; De Veney *v.* Gallagher, 5 C. E. Gr. 33; Cleveland *v.* Citizens' Gas Light Co., 5 C. E. Gr. 201; Babcock *v.* N. J. Stock Yard Co., 5 C. E. Gr. 296; Attorney-General *v.* Steward, 5 C. E. Gr. 415; s.c., 6 C. E. Gr. 340; Meigs *v.* Lister, 8 C. E. Gr. 199; De Luze *v.* Bradbury, 10 C. E. Gr. 70; Kana *v.* Bolton, 9 Stew. Eq. 21; Williams *v.* Osborne, 13 Stew. Eq. 235; Penn. R.R. Co. *v.* Angel, 14 Stew. Eq. 316; Lennig *v.* Ocean City Association, 14 Stew. Eq. 606.

³ Robeson *v.* Pittenger, 1 Gr. Ch. 57; Armstrong *v.* Potts, 8 C. E. Gr. 92; Jaqui *v.* Johnson, 11 C. E. Gr. 321; Shimer *v.* Morris C. & B. Co., 12 C. E. Gr. 364; Iszard *v.* Mays Landing W. P. Co., 4 Stew. Eq. 511; Pope *v.* Bell, 8 Stew. Eq. 1; Sutphen *v.* Therkelson, 11 Stew. Eq. 318; Gawtry *v.* Leland, 13 Stew. Eq. 323; Lennig *v.* Ocean City Association, 14 Stew. Eq. 606.

⁴ Britton *v.* Hill, 12 C. E. Gr. 389.

JAMES HERBERT v. THE PENNSYLVANIA RAILROAD COMPANY.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1887.

[Reported in 43 *New Jersey Equity Reports* 21.]

ON motion for injunction.

Mr. James Flemming for the motion.*Mr. James B. Vredenburgh, contra.*

The CHANCELLOR. The Pennsylvania Railroad Company, by authority of law, is constructing a connection between two points in its main track at Jersey City, for the purpose of avoiding a dangerous and expensive curve. The benefit to be derived from the undertaking will be the shortening of the line of the road, the expedition of travel, the removal of danger to the public in the use of a sharp curve, and the saving of wear to the company's rolling stock.

A portion of this connection is to be upon a solid embankment, in process of construction, over the corner of a meadow, which seems to be a bed of mud and silt of considerable depth. This embankment is to be used, not only for part of the proposed connection between points in the line of the Pennsylvania Railroad, but also by the New Jersey Junction Railroad Company, which connects the Pennsylvania Railroad system with that of the West Shore Railroad Company, and it has so nearly reached completion that the regular passenger trains of the New Jersey Junction Railroad are now running upon scheduled time over the portion of it which lies nearest to the complainant's lot hereafter mentioned.

The defendant company has been at work upon the embankment for nearly sixteen months, has put in it about one hundred and sixty thousand cubic yards of earth and other filling, and has expended upon it many thousands of dollars.

The complainant is the owner of a lot adjacent to the embankment, twenty feet wide and eighty feet deep, upon which is erected a three-story frame tenement house. He purchased this lot about twenty-five years ago from one Edgar B. Wakeman, who had laid out his property into blocks, lots, and streets, and mapped it. His deed describes the lot by reference to the map of Wakeman and the blocks, lots, and streets shown thereon. The city of Jersey City accepted the dedication of the streets to the public use by Wakeman, and took control of them; but in May, 1887, under and in pursuance of the provisions of the city's charter, vacated the portions which were occupied by the defendant's embankment, and abutted by its property.

Within the past two months the surface of the complainant's lot has been irregularly upheaved, so that his building is almost a complete

wreck and has been deserted by the tenants who occupied it. The complainant claims that this upheaval is due to the deposit of filling material used in the construction of the embankment upon the soft meadow. His theory is that the filling either displaced the silt and mud and forced it back upon adjacent property, of which his lot is a part, or that the filling material itself moves upon and through the mud, under the surface of his lot and up through that surface, and he insists that from one or the other or both of these causes the surface of the lot has been and is being disturbed.

He also claims that because Wakeman described his lot in the deed he gave for it by reference to the map aforesaid and the streets shown upon it, that he is entitled to have the embankment removed from the portions of the streets which have been vacated, and the further filling upon such portions of the streets stopped.

He asks for a mandatory injunction to remove the entire filling, because he claims that it continues to damage his property, and to remove that part of it which is in the vacated streets, not only because of its damage to his property, but also because it disturbs his use of the streets by virtue of the right given to him by the Wakeman dedication.

He asks also for a preventive injunction to restrain further filling, for the same reasons.

A mandatory injunction should be issued interlocutorily with hesitation and caution, and only in an extreme case where the law plainly does not afford an adequate remedy.¹

It does not with any certainty appear that further injury will result to the complainant from the embankment or the further filling upon it. It can hardly be doubted that the filling already done has damaged the complainant's building. The gradual rising of the surface of the meadow adjacent to the embankment, as the filling progressed, satisfies me of this. But whether this was caused by the forcing back of the mud and silt as the embankment sank, or by the filling itself spreading out into the meadow, is a matter of mere conjecture. It may be, for aught that appears to the contrary, that the embankment has now reached a solid foundation, and that it will not further force back the silt, and it may be, if it has spread, that the spreading is now checked. It does not follow from the continual sinking of the embankment that injury will thereby be done to the adjacent property. The sinking may result from the condensation of that which is already in the bank.

Although questions of law, intricate and unsettled in the courts of this State, may be involved in a suit by the complainant to recover damages,

¹ Longwood Valley R.R. Co. *v.* Baker, 12 C. E. Gr. 166; Whitecar *v.* Michenor, 10 Stew. Eq. 6; Lord *v.* Carbon Manufacturing Co., 11 Stew. Eq. 459.

I am satisfied that the filling has been a nuisance to him, from which he has suffered and for which he has his remedy by action at law.¹

The right of this court to interfere in case of a nuisance does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from a future injury for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation for the recovery of damages for an actionable wrong.²

It has not been made satisfactorily to appear that the litigation to which the complainant must resort will not be settled in one suit.

This case is not, in its equitable aspects, as the complainant insists, like the case of backwater from a dam which overflows the complainant's land. The backwater will lie upon the land till the cause of its backing there is removed. Here, at any moment, the disturbance in the complainant's lot may cease. In the one case the injury is certainly continuous until the dam shall be lowered or removed, while in the other it is as probable that the damage is now at an end as it is that it will continue, and if it now continues it is almost certain that in a short time, in obedience to natural laws, it will cease. In such a condition of uncertainty as to future injury, and in view of the fact that the complainant has an adequate remedy at law, I am most decidedly of the opinion that this court should not, by its mandatory injunction, compel the defendant to expend thousands of dollars in destroying that which it has expended so much in building up, and that under such circumstances the court should not, by its preventive injunction, stop the completion of a work upon which so much has been expended and which will be of as great public benefit as it appears this will be.

The complainant's building is now badly wrecked and deserted by its tenants, and the possible future damage to him will be small in comparison to the injury which the issuance of either a preventive or mandatory injunction, at this time, will certainly work to the defendant. In such a situation the complainant must be left to his legal remedy.³

The same reasoning must apply to the complainant's claim that he is deprived of his rights in the vacated streets. The damage to him by the taking away of these rights is small when compared to the injury which the injunction he seeks would work to the defendant. What those rights are, or indeed, if such rights exist at all, is, to say the least, doubtful and unsettled in this State, and such doubt is a reason why an interlocutory injunction should not issue.

The motion will be denied.

¹ Perrine v. Bergen, 2 Gr. 355.

² Carlisle v. Cooper, 6 C. E. Gr. 585.

³ Quackenbush v. Van Riper, 2 Gr. Ch. 354.

WILLIAM T. BAILEY, APPELLANT, *v.* CATHARINE SCHNITZIUS, RESPONDENT.

IN THE COURT OF ERRORS AND APPEALS, NOVEMBER TERM, 1888.

[Reported in 45 *New Jersey Equity Reports* 178.]

THE bill of complaint was filed to restrain the defendant, William T. Bailey, and another, from in anywise filling in, blocking up, and obstructing an alleged ancient water-course running over lands of the complainant, crossing a public highway called Lee's lane, and on and over lands of the defendant; and commanding them to remove the obstructions now existing and placed therein by them. The defendant, who owned land on the westerly side of the highway, has filled, graded, and improved his land, laying it out and mapping it for building lots, and made an embankment about two feet high and eighteen feet long, on the line of the road, shutting off the flow of water over his land. On bill and affidavits, answer and affidavits, rule to show cause, and oral evidence taken before the Vice-Chancellor, he advised, and a mandatory order was issued, according to the prayer of the bill, restraining the defendant from in anywise filling in, blocking up, and obstructing the said ancient water-course, and commanding him to remove the obstructions now existing and placed there by him and his agents.

The appeal is taken from this order, advised by Vice-Chancellor Bird.¹

Messrs. Garrison & French for the appellant.

Mr. J. W. Westcott for the respondent.

The opinion of the court was delivered by

SCUDDER, J. This case is burdened by the large amount of testimony taken by many witnesses examined on the rule to show cause why a preliminary injunction should not be issued. The affidavits annexed to the bill were met by the answer and affidavits in reply. Besides these full evidence was offered and taken, as if in preparation for final hearing. In these preliminary proceedings, therefore, the whole case has been substantially heard, decided, and relief given as if on final hearing. Other affidavits than those annexed to the bill for injunction and the answer may not be read unless taken on application and for special reasons.² *Cleveland v. Citizens' Gas Light Co.*³ is a case where, for such reasons, similar proofs were taken. But although the objection was made when the testimony was taken, and

¹ The conclusions filed by the learned Vice-Chancellor have been omitted.
—ED.

² Ch. Rule 121.

³ 5 C. E. Gr. 201.

on the argument, yet this practice is discretionary, and not appealable.' Such is, however, the true position of the case, that it is here to be examined on the affidavits taken in proceedings for a preliminary injunction, and not on appeal from a final decree.

The gravamen of the defendant's appeal is, that by this course of proceeding the court has been induced to grant a mandatory order to remove alleged obstructions, which have been put up for the improvement of his property, under claim of right to do so, and with denial of the right of the complainant to overflow his lands. This right of overflow has never been adjudged at law; nor, according to the established practice in equity, on a final hearing. The practice of these courts in ordering mandatory injunctions on a preliminary or interlocutory motion was thoroughly examined by Chancellor Zabriskie in *Rogers Locomotive Works v. Erie R.R. Co.*,² with the conclusion, that a mandatory injunction, or one which commands the defendant to do some positive act, will not be ordered, except on final hearing, and then only to execute the decree or judgment of the court, and never on a preliminary or interlocutory motion, *except in cases of obstruction to easements or rights of like nature, in which a structure erected and kept as the means of preventing such enjoyment, will be ordered to be removed, as part of the means of restraining the defendant from interrupting the enjoyment of the right.*

There is, however, a qualification to be added to this statement of the principle established in that case, which has been subsequently approved and followed in our courts. It is applicable to the present case, and is found in *Durell v. Pritchard*,³ which decides, that there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the bill, and there is no difference in this respect between injury to easements and to other rights. *But* the court will only grant such an injunction to prevent extreme or very serious damage. That was a case on final hearing, where the complaint was made that there was a substantial obstruction both to the right of way and to the light and air by the erection of a building near to that occupied by the complainant. The court said, that as to none of these grounds was there any such extreme or serious damage as to justify the mandatory injunction which was asked. As to the right of way, it was not wholly stopped, and the question was one of comparative convenience of the right of way as it formerly existed and as it now exists, and that the diminution of light and air was not such as would warrant the court in granting the relief which was asked by the

¹ 3 Dan. Ch. Pr. § 1884; *Poor v. Carleton*, 3 Sumn. 70.

² 5 C. E. Gr. 379.

³ L. R. (1 Ch. App.) 244.

removal of the building. The court doubted also whether the complainant had, at the time of filing his bill, any case entitling him to relief in equity. *Hart v. Leonard*¹ considers the cases wherein a substantial dispute over a private legal right in land is cognizable in a court of equity. We have decided this case on other grounds. In *Lord v. Carbon Iron Co.*,² Vice-Chancellor Van Fleet has stated what is now the settled law in our courts, that as this form of injunction, to accomplish its purpose, must command or coerce the defendants to do certain affirmative acts, not merely to remain inactive or refrain, it is rarely granted before final hearing or before the parties have had a full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. It is always granted cautiously, and is strictly confined to cases where the remedy at law is plainly inadequate. A preliminary mandatory injunction will be ordered only in case of extreme necessity.³

The examination of the facts in this case do not show that extreme or very serious damage, at least, will ensue from withholding the relief given by this mandatory order, nor does it clearly appear that the complainant is entitled to it.

The allegations and proofs of the complainant that this is an ancient water-course, running through her land, crossing the road, and flowing over the land of the defendant, are met by the denial in the answer and the affidavits of the defendant that it is such water-course. On the contrary, it is said, that it was a gully or depression on the lands of the complainant, which, in times of heavy or continued rains, received the surface-water and carried it to the road, where it was run off, or soaked away; that it was only in extremely heavy rains that it crossed the road and ran on to the lands of the defendant; that about 1872 or 1873 ditches and drains were made on the lands of the complainant, that turned all the soakage of the adjacent low, wet, and marshy lands into this gully, or into a running stream about five hundred feet north of this gully, which, it is not disputed, is an old water-course; that the effect was to increase the flow of water, and make a trunk across the road necessary at this point to save it from washing out and keep it possible for travel; and that in heavy rains the water passing through the trunk was emptied from the west side of the road on the defendant's lands; that without this accumulation and concentration of water from these drains and ditches, into the larger

¹ 15 Stew. Eq. 416.

² 11 Stew. Eq. 452.

³ *Delaware, Lackawanna & Western R.R. v. Central Stock-Yard Co.*, 16 Stew. Eq. 77, 605; *Herbert v. Pennsylvania R.R. Co.*, 16 Stew. Eq. 21; *Whitecar v. Michenor*, 10 Stew. Eq. 6; *Longwood Valley R.R. Co. v. Baker*, 12 C. E. Gr. 166; *High Inj.* § 2; *2 Story Eq.* § 929 (b).

artificial ditch made by the complainant in the gully, and leading to the road, there would be no overflow of the road, or over it on the defendant's lands. If the complainant has imposed this increased burden on the defendant's land to the extent of such increase, the defendant may have the right to protect himself. This he claims he has done by the filling in and embankment on the westerly line of the road and on his own land, of which complaint is made in the bill.

But the particular injury which the complainant sets up as causing such extreme or very serious damage as to call for a mandatory injunction, is that, by the back-water and washing in, the road in heavy rains is made impassable. In this, if it appear, she must show peculiar damage to herself as an individual, and not general damage as one of the public. Her house is near the road, a short distance from this filling or embankment, and the evidence shows, that, since the filling in of the defendant's land, the road has been impassable in times of heavy rains, whereby the complainant has been obliged to go by another road, about a mile and a half farther, when wishing to travel in that direction over a public road. There is no proof of actual damage by back-water on the complainant's land causing irreparable injury, nor does it appear that she is barred from getting off her premises on to a public road. It is a case of inconvenience rather than one of extreme necessity; and the relief sought by mandatory injunction, before the facts are fully heard and settled on final hearing, is not according to the practice of a court of equity.

The injunction order will be reversed.

Order unanimously reversed.

DANIEL *v.* FERGUSON.

IN THE COURT OF APPEAL, FEBRUARY 25, 1891.

[*Reported in Law Reports, 2 Chancery (1891), 27.*]

THE plaintiff was the owner of long leases of three adjoining houses, 49, 51, and 53 Hereford Road, Bayswater. In September, 1890, the defendant prepared to build upon a piece of ground adjoining the south side of No. 49 a large building to be called Hereford Mansions. The plaintiff had the plans inspected on his behalf, and came to the conclusion that the proposed erection would materially affect the access of light and air to his houses. After some correspondence, the plaintiff, on the 28th of November, 1890, issued his writ in this action for an injunction, and on Saturday, the 29th, notice of motion for injunction for Friday, the 5th of December, was by

leave of the court served on the defendant, along with the writ. The service was between twelve and one o'clock. At two o'clock the defendant turned on a large number of men, who went on building all through the night and until 2 P.M. on Sunday. On Monday they resumed work, and ran up the wall adjoining No. 49 to the height of about thirty-nine feet from the ground.

On Monday, the 1st of December, the plaintiff, being informed of the rapid progress of the building, applied *ex parte* for an interim injunction till Friday, which was granted. Notice of this was given to the defendant on the same day, and he ceased building.

When the motion of which notice had been given was brought on, the defendant adduced evidence with a view to showing that the plaintiff had no easement of light over the defendant's land. The facts deposed to were as follows:

On the 16th of June, 1841, the defendant's land was demised to James Bott for eighty years by the then owner. On the 15th of October, 1860, Bott underlet to Underwood for sixty years. Bott died in 1866, and, subject to the underlease, the eighty years' term was vested in his executors till 1884, when it was assigned to the defendant's predecessors in title, who afterwards acquired the fee and got in the sixty years' term. The plaintiff's property was demised to James Bott in 1854 by the trustees of the Paddington estate of the Bishop of London, and this leasehold interest remained vested in Bott and his executors till 1882, when it was assigned to the plaintiff's predecessor in title. It thus appeared that from 1854 to 1882, Bott and his executors were entitled to the leasehold interests now vested in the plaintiff, and also to the term of eighty years in the defendant's property, subject to the underlease granted in 1860 to Underwood.

The evidence as to the effect of the building went to show that it would seriously affect the light of No. 49.

The motion of which notice had been given came on to be disposed of on the 19th of December, and Mr. Justice Stirling made an order restraining the defendant until judgment or further order from building on the land in question so as to darken the lights of the plaintiff's houses, and from permitting the wall or building which he had erected to remain on his land.

The defendant appealed.

Horace Kent for the appeal.

Buckley, Q.C., and *Frank Watson*, for the plaintiff, were not called upon.

Lindley, L.J. I am of opinion that this appeal must be dismissed without dealing with the question to be decided at the trial whether the plaintiff has an easement of light. It appears to be a nice ques-

tion whether there was not at one time such a unity of possession as would prevent the plaintiff's houses from acquiring the easement. The plaintiff makes out a case entitling him to an injunction to keep matters in *statu quo* till the trial. That being so, the defendant, upon receiving notice that an injunction is going to be applied for, sets a gang of men to work and runs up his wall to a height of thirty-nine feet before he receives notice that an injunction has been granted. It is right that buildings thus run up should be pulled down at once, without regard to what the result of the trial may be.

KAY, L.J. I am of the same opinion. The questions to be decided at the trial may be of some nicety; but this is not the time to decide them. After the defendant had received notice on Saturday that an injunction was going to be applied for, he set a large number of men to work, worked all night and through nearly the whole of Sunday, and by Monday evening, at which time he received notice of an interim injunction, he had run up his wall to a height of thirty-nine feet. Whether he turns out at the trial to be right or wrong, a building which he has erected under such circumstances ought to be at once pulled down, on the ground that the erection of it was an attempt to anticipate the order of the court. To vary the order under appeal would hold out an encouragement to other people to hurry on their buildings in the hope that when they were once up the court might decline to order them to be pulled down. I think that this wall ought to be pulled down now without regard to what the result of the trial may be. The appeal will therefore be dismissed.

MALON E. BRANDE AND ANOTHER *v.* JAMES J. GRACE
AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
20, 23, JUNE 27, 1891.

[*Reported in 154 Massachusetts Reports 210.*]

BILL IN EQUITY, filed in the Superior Court on August 30, 1890, against James J. Grace and the American Protective League, to prevent the defendants from altering a building. The case was heard by Mason, J., and reported for the determination of this court, and was as follows:

The plaintiffs composed the firm of Brande and Soule, dentists; and the defendant Grace was the lessee of premises numbered 181 Tremont Street, in Boston, which included a six-story building set back from twelve to fourteen feet from the sidewalk of that street.

The unoccupied land between the building and the street was included in his lease, and was used as a part of the sidewalk, but had never been dedicated to the public. On or about February 1, 1888, Grace executed a sublease, with a covenant therein for quiet enjoyment of a portion of the building, described as "the rooms numbered 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with all the rights and privileges thereto belonging, . . . from the first day of March, A.D. 1888, during the following term of four years (4) thence next ensuing, expiring February 29, A.D. 1892." These rooms included the front rooms on that story, and from them an uninterrupted outlook was to be had into the street. The plaintiffs, who were already in occupation of the rooms as tenants of Grace, continued thenceforward to occupy the rooms, and to do a profitable business in dentistry there, and allowed their signs attached to the outside face of the front wall to remain there. Subsequently Grace sublet the entire premises to the American Protective League for a term of years, which corporation proceeded to alter the building by taking down the original front wall thereof, and by extending its side walls to the street line and erecting a new front wall to the entire height of the building, so as to enclose the rooms leased and occupied by the plaintiffs, and to interpose another room between them and the street. This bill was then brought by the plaintiffs to prevent such alterations from being made, and a temporary injunction was issued to prevent the defendants from taking down so much of the original front wall as enclosed the second story of the building. The plaintiffs then discontinued as to Grace, and filed a supplemental bill praying that the defendant corporation might be prevented from making its proposed alterations. At the hearing, the judge made a final decree that the injunction already issued should be continued to the end of the plaintiffs' tenancy, but ruled that the plaintiffs had acquired no right to the light and air which would be obstructed by the other proposed alterations, and refused an injunction to prevent the same. The defendant corporation thereupon proceeded to erect, and had completed the new front wall, and had extended the side walls of the building so as to unite with the same, thus cutting off the light and air from the plaintiffs' front rooms, and covering up their business signs upon the external surface of the original front wall.

A. Russ (D. A. Dorr with him) for the plaintiffs.

R. M. Morse, Jr. (J. M. Olmstead with him) for the defendant corporation.

ALLEN, J. The determination of this case depends upon the proper application of rules of law, which of themselves are simple.

"The grant of anything carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it."¹ And in order to determine what is thus granted by implication, the existing circumstances, and the actual condition and situation of that which is granted, may be looked at.²

The premises leased to the plaintiffs were described as "the rooms numbered 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with all the rights and privileges thereto belonging." These rooms included all the front rooms in the second story of the building. The building was set back twelve or fourteen feet from the line of the street, and the space between the building and the line of the street had been used as a part of the sidewalk, but never dedicated to the public. The rooms were therefore front rooms, from which the view of the street was unobstructed. The plaintiffs hired the rooms for business purposes. The alterations which the defendants were proceeding to make would have the effect to interpose another room between the leased rooms and the street, and the plaintiffs' rooms would no longer be the front rooms of the building.

Alterations of this character are inconsistent with the rights of the plaintiffs under their lease. It could not have been understood at the time the lease was given that a right to make such alterations was reserved. It is not like the case of the erection of a building, either by a stranger or by the lessor, upon an adjoining lot, which is adapted to have a separate building erected upon it. In this case the lessor, or those holding his title, seek to make such changes in the building itself which contains the leased rooms as will essentially change their character. The subject of the lease is so materially changed that the rooms will no longer answer to the description of them in the lease, when the condition and situation of the premises are also looked at. The lease carries with it an implication that the lessor should not thus proceed to impair the character and value of the leased premises.³

We do not regard this view of the rights of the parties as at all inconsistent with the decision in *Keats v. Hugo*⁴ and other cases, which hold or intimate that the necessity must be pretty plain in order to warrant the implication of a grant. In this case it is plain that the alterations are inconsistent with the rights of the plaintiffs under their lease.

¹ *Salisbury v. Andrews*, 19 Pick. 250, 255.

² *Id.*

³ *Ibid.*, 128 Mass. 336; *Doyle v. Lord*, 64 N. Y. 432.

⁴ 115 Mass. 204.

Under this state of things the defendants might properly have been enjoined from proceeding with their proposed alterations. But the learned justice before whom the case was heard in the Superior Court took a different view of the rights of the parties, relying, it is said, upon *Keats v. Hugo*; and accordingly the plaintiffs' prayer for an injunction was refused. The defendants thereupon proceeded with the work, until now it is completed, so far at least as the external structure of the building is concerned. The lease to the plaintiffs will expire on the last day of February next, and, if the defendants were now ordered to pull down their structure, they might then restore it. The rules under which mandatory injunctions have been issued for such a purpose should not be applied in a case like this.¹ It would cause an unnecessary destruction of property. In view of the early termination of the plaintiffs' lease, their remedy should now be confined to compensation in damages, to reimburse them for the injury which they have suffered.

Decree accordingly.

JOHN STARKIE *v.* WILLARD RICHMOND.

JAMES GREEN *v.* SAME.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER
1, 1891; JANUARY 6, 1892.

[*Reported in 155 Massachusetts Reports 188.*]

TWO BILLS IN EQUITY, filed in the Superior Court in January, 1889, to enjoin the defendant from interfering with a way in the city of Worcester, and to compel him to remove a building and fences therefrom. Hearing before Aldrich, J., who, after the entry of a final decree in each suit, reported the cases for the determination of this court, and directed a stay of further proceedings until they should be determined.²

The presiding justice found that the defendant's new building stands partly on land over which teams were accustomed to pass in the rear of the Slater Block; and that the defendant by his building near the line of Main Street had narrowed the passageway thirty-seven hundredths of a foot, and at the actual line of Main Street over forty-six hundredths of a foot; and that he had widened it two-tenths of a foot where the southeast corner of the Slater Block stood. He refused, however, to order the removal of the building, for the fol-

¹ *Attorney-General v. Algonquin Club*, 153 Mass. 447.

² A portion of report has been omitted.—ED.

lowing reasons. First, that the defendant had the right to occupy his rear lot with a permanent building, leaving a passageway convenient for teams to pass and repass to and from the premises of the plaintiff Green, and leaving a passageway for teams to pass and repass to and from the premises of the plaintiff Starkie, substantially and for all practical purposes such as was conveyed to Starkie by Davis by his deed of 1872, as he found would be done when a post and fences and other obstructions were removed, as ordered in the final decrees heretofore filed in these cases. Secondly, because the plaintiffs, long after they knew in what condition the defendant's building left the passage, requested the defendant to unite with them and others in causing the passageway to be concreted and paved, as it then was, which the defendant did, as hereinbefore stated. Thirdly, because of the long acquiescence of the plaintiffs in the way as it was after the said new building was erected, taking no steps for its removal, until the commencement of these suits, and making no complaint until after the building of said fence in 1887. Since the filing of the final decrees, the defendant has removed the fence and post, and all other obstructions to the way, in conformity with the decrees, so that the passageway is now in width and form substantially as it was during the nine years from 1878 to 1887.

F. P. Goulding and R. Hoar for the plaintiffs.

W. S. B. Hopkins (F. B. Smith with him) for the defendant.

MORTON, J. When the defendant began the erection of his building he was notified by the plaintiff Starkie that the foundation was on the passageway. The defendant, relying upon his own deeds, made no change, and proceeded with the building. The court found at the trial that the building encroached upon the way. If Starkie, upon discovering the trespass, had applied seasonably to the court, the defendant might, perhaps, have been compelled to remove his building from the way.¹

He did not do that. He lived there and carried on business there, knew the condition of things, and he and others who had occasion to go to and from his premises used the way; but from 1878, when the building was erected, till 1887, when the fence of which he complained was built, he took no steps towards the removal of the block, or to recover damages, or to assert his rights. He was not only passive when he should have been active, but he was active when he should have been passive. During the latter part of the time he had several interviews with the defendant about paving the passageway from Main Street, and the area in the rear of the defendant's block,

¹ *Linzee v. Mixer*, 101 Mass. 512; *Tucker v. Howard*, 128 Mass. 361. Only so much of the opinion is given as relates to this question.—ED.

and he, with the defendant and others interested, paved the same at their joint expense up to the block, without any objection, so far as appears, that it encroached on the way. With the exception that he was abroad when the block was built, and did not know till some years after that the way was narrowed, though he might readily have ascertained it, what has been said as to Starkie will apply to Green. In addition to this, it is found by the presiding justice in both cases, that the fence, post, and other obstructions which the defendant was directed by the final decrees to remove, have been removed by him, and that the passageway is now in width and form substantially as it was from 1878 to 1887. The presiding justice, in anticipation of these removals, further found that, when they were made, there would exist in the case of Starkie a passageway to and from his premises, substantially and for all practical purposes such as was conveyed to him by the Davis deed in 1872; and in the case of Green, that there would be a passageway convenient for teams to pass and repass to and from his premises. This was what the deed of Davis to the predecessors in title of Green, in 1834, called for.

In view of these facts, we think that the refusal of the presiding judge to order the removal of so much of the building as stood upon the way was correct. It is not every case of a permanent obstruction in the use of an easement that entitles the aggrieved party to a restoration of the former situation. Each case depends on its own circumstances. It is for the court, in the exercise of a sound discretion, to determine in such instances whether a mandatory injunction shall issue. It will not be issued when it appears that it will operate inequitably and oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor when the injury complained of is not serious or substantial, and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss.¹ It is plain that all these elements exist in this case.

¹ 2 Story Eq. Jur. 959a; Kerr on Injunctions (1st Am. ed.) 231; Royal Bank of Liverpool *v.* Grand Junction Railroad, 12 Mass. 490; Lewis *v.* Chapman, 3 Beav. 133; Gaskin *v.* Balls, 13 Ch. D. 324; Aynsley *v.* Glover, L. R. 18 Eq. 544.

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